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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 202

EDDIE DEAN GRIFFIN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE PETITIONER

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Summary Statement of the Case

Eddie Dean Griffin was charged in an information with murder, in violation of Section 187, Penal Code of California, of one Essie Mae Hodson on December 4, 1961, in Los Angeles, California. (C.T. 3) The defendant was also charged with two prior felony convictions: rape in Illinois in 1946 and of being a sexually dangerous person in Illinois in 1955. (C.T. 4) The second prior, being a sexually dangerous person, was later withdrawn and dismissed by the court. (C.T. 78)

The preliminary hearing was held in the Municipal Court of the Los Angeles Judicial District, Los Angeles County,

California, and on May 5, 1962, the defendant was held to answer. (C.T. 2) Thereafter, on May 22, 1962, the information mentioned above was filed against him. (C.T. 3) After arraignment and appointment of the Public Defender in Department 100, Superior Court of Los Angeles County, California, the case was assigned to Department 110, the Honorable Joseph L. Call, Judge, presiding. A plea of "not guilty" was entered and the cause set for trial on July 2, 1962. (C.T. 5-7) On July 2, 1962, on motion of defendent, the case was continued for trial to August 27, 1962. (C.T. 8)

Apparently, after another continuance on October 9, 1962 trial commenced. The defendant admitted both prior felony convictions. Jurors were selected. (C.T. 9)

On October 10, 1962, the People made an opening statement and commenced presenting testimony. (C.T. 10)

On October 16, 1962, the People rested their case. The defense then presented its evidence and rested. The defendant did not testify. (C.T. 13)

On October 17 and 18, 1962 both counsel presented argument to the jury. The jury was instructed and retired to deliberate at 2:38 p.m. (C.T. 15)

On October 19, 1962, the jury found the defendant guilty of murder in the first degree. (C.T. 77)

On October 24, 1962 the motion of defense counsel for a new trial and reduction of the conviction to second degree was submitted. The second prior was withdrawn and ordered stricken. On motion of defendant, the penalty trial was continued to October 29, 1962. (C.T. 78)

On October 29, 1962 the motion of defense counsel to suppress People's evidence to be offered on the penalty issue, concerning an offense of which defendant had been

found "not guilty" in Mexico was denied. Dr. Marcus Crahan was appointed to examine the defendant pursuant to Section 1871, Code of Civil Procedure of California. The People presented evidence on the penalty issue and rested. (C.T. 79)

On October 30, 1962 the defense continued with evidence on the penalty issue. The defendant testified. Both sides rested.

Eddie Dean Griffin, an indigent negro, 50 years of age, was charged in an information, No. 258541, in the Superior Court of Los Angeles County, of the crime of murder on the 4th day of December 1961. It was alleged that he killed Essie Mae Hodson, a negro woman. He was also charged with two prior felony convictions, to-wit: the crime of rape, alleged to have been committed on May 2, 1944, for which he served a term of imprisonment in State Prison in Illinois. Also, on September 14, 1955, he was convicted in Illinois of the crime of "sexually dangerous person, a felony" and sentenced to prison. The defendant had no means to employ counsel to defend himself and the Public Defender of Los Angeles County was appointed. Upon the conclusion of the appeal in the State court, that office asked present counsel to carry the case to the United States Supreme Court.

It appears from the record that the defendant, on December 2, 1961, met Eddie Seay and a friend of Eddie's, named Al, on a street corner in Los Angeles and asked them how to get to the 41st Street Club, a nearby bar. A bottle of wine was purchased. About 9 o'clock Eddie and Al entered the 41st Street Club and sat in a booth with Essie Mae Hodson and two other people. Eddie had been living with Essie Mae since 1957 and referred to her as his common law wife. About 1 o'clock Essie Mae left and Eddie and the defendant remained in the bar until 2 o'clock. They all had been drinking. Eddie was fairly intoxicated and he thought the defendant was also and invited the defendant

to stay at his apartment, which he and Essie Mae shared. The defendant was told he could sleep on a day-bed in the living room. Later, during the night, there was a noise and a struggle and Essie Mae told him that the defendant had put his hand over her mouth and tried to make her accept him for sexual relations. Eddie took the defendant down the back stairs and out of the building. Five minutes later Eddie heard the defendant knocking and the sound of glass breaking and the defendant came in the back door. About 7 o'clock the next morning Alfredo Villasenor walked down an alley behind the apartment building looking for a piece of scrap lumber. He saw Essie Mae, the deceased, who had blood on her clothes. She was trembling and apparently suffered a severe beating. She was sitting on top of a sawdust box and appeared to be in shock and could barely state her name. She was taken to the receiving hospital and treated for bruises but was unable to answer questions. She died the following day. An examination of her genital organs failed to reveal the presence of spermatozoa.

Defendant was charged with her murder. He was arrested in Mexicali, Mexico, where he was questioned. He had previously been tried in Mexico for an alleged rape and had, in effect, been found not guilty and he was released there. Nevertheless, the court, in the instant case, permitted the testimony of the two witnesses in Mexico who testified against the appellant there to be produced by the prosecution and their testimony was again admitted in the court in spite of the acquittal. Also, the defendant was penniless and tried to get the officials of the Mexican court and government to appear but was unable to do so.

The defendant did not take the stand during his trial but stood upon his constitutional rights. Nevertheless, the prosecutor was permitted to comment on his failure to take the witness stand and the court instructed the jury that

"it is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely on his own decision. As to any evidence or facts against him which the defendant can be reasonably expected to deny or explain because of facts within his knowledge, if he does not testify or if though he does testify he fails to deny or explain such evidence the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable."

Defendant was found guilty of first degree murder on October 19, 1962 and in the penalty phase of the trial the penalty was fixed of death on November 2, 1962 and the death warrant was forwarded to the prison on September 5, 1963. The State of California affirmed the judgment but with a dissenting opinion by Justice Peters in which he stated as follows:

> "Defendant denied having committed the Mexican offense. This created no more than a conflict in the evidence. But the real question is whether defendant had committed this crime. It had been judicially determined in Mexico that there was not sufficient evidence to show that defendant had committed the offense. As the majority correctly point out, '[d]efendant was brought to trial by a Mexican court on a charge of rape and released,' that is, acquitted. But, in the prosecution in Los Angeles, the two principals in the Mexican case were permitted to testify to the very facts that had led the Mexican court and investigating officials to release the defendant. Defendant was compelled to rely on his version of the facts, unsupported by corroborating testimony. The credibility of the prosecution witnesses

had already been judicially passed on adversely in Mexico. But now the defendant was called upon to once again face those very same witnesses. He was called to answer the argument of the prosecution that the Mexican court had 'made a mistake' and 'I ask you ladies and gentlemen not to perpetuate the error.' The prosecuting attorney several times told the jury that through his Mexican witnesses he had demonstrated that defendant had committed the offense in Mexico. The jury was told by the rulings on the evidence, and the arguments of the prosecutor, that it could not only believe these witnesses who testified as to the Mexican offense, but that it could, in effect, determine for itself whether the Mexican offense had been committed. They were told by the prosecutor that, if they came to the conclusion that the offense had been committed, they could consider that fact in determining what penalty to impose. This was unfair and deprived defendant of a fair trial on the penalty issue.

"The general rule is, of course, that evidence of other offenses is not admissible. To this rule there are several exceptions—but all of them relate to 'other offenses.' It is a far cry from the general rule to now hold, as do the majority, that, even though the defendant has been acquitted of the prior charge, evidence that he in fact committed the offense is now admissible. I realize that the rules of evidence and the proper scope of inquiry, on the penalty phase of the trial, are very broad. By section 190.1 of the Penal Code, on that phase of the trial, evidence 'of the defendant's background and history,' can be admitted. This court, quite properly, has interpreted this provision very liberally, both for defendant and the prosecution. Under the broad provisions of this section it is proper to inquire into all facets of the character of defendant and to show the

jury just what kind of man he is. Under this liberal rule of admission it may be that the prosecution on the penalty phase of the trial could introduce the fact that defendant had been *charged* in Mexico with rape and that he had been acquitted. That is part of his background and history. But to detail the circumstances of the alleged crime through the mouths of witnesses that had not been believed in Mexico was to place the defendant in double jeopardy for the same offense in a very real sense. If there is to be a collateral estoppel against a defendant (Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd., 58 Cal.2d 601, 604 [25 Cal.Rptr. 559, 375 P.2d 439]) there should also be a collateral estoppel in his favor.

"Aside from this reason why detailed evidence of other crimes alleged to have been committed in a foreign country where defendant has been acquitted in that country should not be admitted, there is another sound practical consideration that compels the exclusion of such testimony. Indigent defendants who have to be represented by the public defender, as did defendant here, are not in a position of financial equality with the prosecution, nor do they have the same means of persuasion as does the prosecution. This court and the United States Supreme Court, in a whole series of recent cases, and properly so, have been quite zealous in protecting the rights of indigent defendants against improper invasion. The defense is in no position, as is the prosecution, to induce witnesses to come to this country to testify. In this very case, the record shows that the public defender's office, with its limited resources, did send an investigator to Mexico to try and induce the Mexican trial judge, and the Mexican investigating officers to come to Los Angeles to testify, even offering to pay their expenses. The witnesses

would not come. There was no way to compel them to come. But the prosecution could and did induce the two principals in the Mexican court to come to Los Angeles to testify. Thus, these biased witnesses, who could not convince a court in their own country, who were not believed when the facts were fresh in their minds, were permitted to testify as to the circumstances of the case, while the defense was required to rely on defendant's unsupported and uncorroborated denial of these circumstances. Thus, the rule, approved by the majority, results in a denial of due process and a denial of that fair trial guaranteed by the state and federal Constitutions."

Opinion Below

The opinion of the Supreme Court of California appears in *People* v. *Griffin,* 60 Adv.Cal. 129, and a copy of said opinion is attached hereto as Appendix A.

Jurisdiction

Jurisdiction is conferred upon this Court by the provisions of the Fourteenth Amendment to the Constitution of the United States in its due process and equal protection clause and by the provisions of Title 28, Section 1257, U.S. Codes, and by the Rules of this Honorable Court; also by the provisions of Title 28, Section 1915, U.S. Codes. The judgment in the case was pronounced by the Supreme Court of California on July 18, 1963; a petition for rehearing was denied August 14, 1963. A petition for writ of certiorari was duly filed in this Court, which petition was granted, No. 700 Misc., on June 22, 1964, and the case was transferred to the appellate docket and placed on summary calendar.

Constitutional Provisions and Statutes Involved

This appeal involves the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States, Sections 187, 189, 190 and 190.1 of the Penal Code of California and Section 1915 of the Code of Civil Procedure of the State of California. These provisions are set forth in Appendix B to this brief.

Questions Presented

1. Whether defendant was deprived of his right not to be compelled in his case to be a witness against himself in violation of his constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Whether the defendant was deprived of his right to a fair trial in violation of his constitutional rights to due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States because:

a. The court erred in admitting evidence produced by the prosecution of testimony of witnesses of the commission by the defendant of the crime of rape, a felony, in Mexicali, Mexico, on or about December 19, 1961, where the defendant had, in effect, been found not guilty of the charge by Mexican courts.

b. The district attorney was guilty of such prejudicial misconduct as to deprive the defendant of such a fair trial as is required by due process of law.

3. Whether the evidence was insufficient, as a matter of law, to sustain the conviction of murder in the first degree, or in any degree.

ARGUMENT

I.

The Defendant Had a Constitutional Right to Remain Silent. It Was a Violation of the Fifth and Fourteenth Amendments to the United States Constitution to Permit the Prosecution to Use His Constitutional Privilege as a Sword to Convict Him Rather Than as a Shield to Protect Him. Article 1, Section 13, of the Constitution of California, Inherently and as Construed and Applied in This Case, Violates the Fourteenth Amendment to the Constitution of the United States. Adamson v. California, 332 US 446, Should Be Overruled in the Light of Malloy v. Hogan.

The defendant in this case chose not to take the witness stand. Nevertheless, the fact that he stood upon his constitutional rights was used as a weapon against him to convict him. The prosecution made a forceful argument to the effect that if the defendant was able to explain he would have taken the stand. This was misconduct by the prosecutor as he knew that the defendant had suffered prior convictions of a felony and that he would be seriously impeached and badly reflected upon before the jury. This court has now reversed *Adamson v. California,* in which a 5 to 4 decision previously held to the contrary and *Malloy v. Hogan,* 378 US 1, 12 L.ed.2d at 653 now holds that such procedure violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. It would be unconscionable to permit the prosecution to use a privilege guaranteed by the Constitution as a weapon to convict a defendant, as was done in this case.

In *Malloy* v. *Hogan,* 378 US 1, 12 L.ed.2d 653, 658, this Court said:

> "We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also pro-

tected by the Fourteenth Amendment against abridgement by the States. Decisions of the Court since Twining and Adamson have departed from the contrary view expressed in those cases."

We respectfully urge this Court now to reverse the *Griffin* case on the basis of *Malloy* v. *Hogan* and also to reaffirm its discarding of the *Adamson* v. *California* decision and opinion.

Charles T. McCormick makes the following statement in part at pages 280 and 281 of his work on "Evidence", published in 1954:

> "... But a more substantial motive is created by the rule which permits the prosecutor to cross-examine the accused upon his past convictions of crime. Here the accused may well tremble before he takes the stand. Of course, he should acknowledge his criminal record on direct examination, rather than have it extorted on cross. But even so (and particularly when the past crimes are of like nature with the present charge) the jury will be heavily prejudiced against a man who is thus revealed as a jail-bird. Accordingly, the proposals of the Uniform Rules which allow comment but forbid the cross-examiner to question the accused as to past convictions or otherwise prove them, seem humane and just. Another modification deserving of consideration is that of confining the function of comment on the defendant's silence to the judge, as in England and in Connecticut ..."

In the instant case, the court instructed the jury in part:

> "... As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails

to explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences they may reasonably draw therefrom those unfavorable to the defendant are the more probable . . . ' (See Caljic No. 51, and C.T. 57).[1]

The district attorney took full advantage of this instruction and forcefully argued that if the defendant had any possible explanation he should have taken the witness stand. (See R.T. 605-A64, line 18 to 605-A66, line 4; R.T. 605-A158, line 1 to 605-A160, line 18; and R.T. 605-A168, lines 5 to 21.)[2]

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[1] "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

"In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such essential element."

[2] R.T. 605-A64, line 18 to 605-A66, line 4:

"It is my contention that if the defendant had not beaten, dragged or pushed, and I don't mean drug all the way down

II.

It Was a Violation of Due Process of Law and the Equal Protection of the Laws to Allow the Introduction of Evidence From Mexico on a Case Where He Had Been, in Effect, Acquitted. It Was Unfair Trial Procedure.

The court erred in admitting evidence produced by the prosecution's testimony of witnesses of the commission by the defendant of the crime of rape with injuries, a felony, in Mexicali, Mexico, on or about December 19, 1961, where the defendant had, in effect, been found not guilty of the

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the alley, I don't know what he did, he won't take the witness stand and tell you in this courtroom under oath what he did.

"A defendant has a constitutional right not to become a witness in his own behalf.

"When a defendant does not become a witness, there is no link, if there be a missing link in the People's case, that is supplied by the defendant's failure to take the stand and testify.

"But if there are complete links but some of them are weak and the defendant would have the specific knowledge to explain or deny, then the failure of the defendant to explain or deny as a w tness creates a situation in which the inferences unfavorable to the defendant are the more probable and the weak link, if any, not the missing link, the weak link is strengthened.

"The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her.

"What kind of a man is it that would want to have sex with a woman that beat up if she was beat up at the time he left?

"He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.

"These things he has not seen fit to take the stand and deny or explain.

[*Footnote continued on page 14*]

charge by a Mexican court. The use of this evidence violated due process of law and the equal protection of the laws since California also has a statute which provides:

"A final judgment of any other tribunal of a foreign country having jurisdiction, according to the laws of such country, to pronounce the judgment shall have

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[*Footnote continued from page 13*]

"And in the whole world, if anybody would know, this defendant would know.

"Essie Mae is dead, she can't tell you her side of the story. The defendant won't."

R.T. 605-A158, line 1 to 605-A160, line 18:

"Now, the problem so far as I am concerned, boils itself down to something like this: When I suggest in my opening argument that Mr. Maple is playing games with Mr. Villasenor rather than searching for the truth, the first thing Mr. Maple does when he begins his argument is to rebut that unfavorable—perhaps unfair suggestion. But that isn't what the defendant in this case does with reference to anything that tends to put him in an unfavorable light, something that he would know if anybody would know: He remains silent, and I point this out to show that if somebody knows something is not true, the natural inclination is to stand up and deny it, just as Mr. Maple did it in his argument.

"Now Mr. Maple stood over there for awhile and he was gesturing about maybe how this fumbling with the pants wasn't fumbling in the vein that somebody that fumbles, then he has done number two, maybe he was just brushing the sawdust off.

"In any event, this is something that the defendant would know whether he was fumbling with his pants as though he had just done number two or whether in the manner of the fastidious man, he is brushing himself off as a Fancy Dan.

"Since the defendant hadn't taken the stand and explained or elucidated on the thing that Mr. Villasenor said he saw, I think the inferences unfavorable to the defendant are the more likely and it is not just as reasonable that he was brushing sawdust off his clothes.

"But since murder is the unlawful killing of a human being with malice aforethought, the malice aforethought may be express or it may be implied, and it is implied on a situation where the circumstances show an abandoned and malignant heart.

"Now if this defendant got up from this bin after having had sex with this woman, where she freely and voluntarily

the same effect as in the country where rendered, and also the same effect as final judgments entered in this state." (Section 1915, Code of Civil Procedure of California.)

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starts out, as Mr. Maple starts out, she leads him down the alley, but she ends up in this semi-conscious beat up position, and he does nothing to aid or assist her except (indicating) Fancy Dan, brush himself off, and walk down the alley cool as a cucumber, I think this shows an abandoned and malignant heart.

"Now if one of you ladies and gentlemen in this jury box would suddenly slide off of your chair, no visible damage except that apparently you have slid off the chair in some kind of a coma, I would suggest to you that everybody in the courtroom would be rushing over to try and aid or assist you. Not this defendant, however. He brushes himself off and walks away.

"Now if that's what he was doing, brushing himself off, I think this shows an abandoned and malignant heart, which is an element of murder.

"Now Mr. Maple made some remarks about the absence of male sperm a few days later when the autopsy was performed.

"Well, again, ladies and gentlemen, this is something that the defendant if anyone in the whole world would know. This defendant would know whether or not he had sexual relations with this woman and this defendant would know whether or not he had used a contraceptive. This defendant would know whether or not he had had a vasectomy. This defendant would know whether or not he suffers from some disease that would make the existence of sperm impossible. He has remained silent."

R.T. 605-A168, lines 5 to 21:

"Now, Mr. Maple made some comment about Dr. Noguchi and he is saying some of these injuries or damages could have been caused by dragging. That is Dr. Noguchi's opinion. I assume the defendant heard it.

"If anybody in the whole world would know that this woman was not dragged, it would be the defendant. And he has remained silent in the face of this so-called accusation.

"Mr. Maple made a remark about the statement at Mexicali and therefore the defendant doesn't have to take the stand to testify, he has already told you his story.

"May I remind you, ladies and gentlemen, that at the time of that interview, the defendant didn't know that the woman was dead.

[*Footnote continued on page 16*]

This is the principle of the doctrine of res judicata,[3] which this Court has upheld, and see 29 Cal.Jur.2d p. 167, 26 Cal. State Bar Journal 366.

Sealfon v. *United States*, 332 US 575, 92 L.ed. 180;
United States v. *Oppenheimer*, 242 US 85, 87;
United States v. *De Angelo*, 138 F.2d 466, 468;
Frank v. *Mangum*, 237 US 309, 334;
United States v. *Adams*, 281 US 202, 205.

Justice Peters, in his dissenting opinion, discussed at length the matter of the Mexican evidence. (See pp. 5-8, *supra.*)

It is respectfully submitted that full faith and credit should be given to the courts of Mexico and that this evidence should not have been admitted and its use constituted a denial of due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

III.

Defendant Was Denied Fair Trial by the Use of Evidence From Mexico Where He Had No Opportunity to Defend Himself or Bring Witnesses From That Country.

This case involves a negro defendant, whose innocence of the crime of murder and rape would appear from the face of the record and the facts as set out in the record. There is nothing in the record to show that he raped Essie Mae Hodson. Nevertheless, the prosecutor tried the case wholly on the theory that murder was committed in the course of rape which, under the laws of the State of Cali-

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[*Footnote continued from page 15*]

"Now that he apparently knows she is dead and he is charged with the murder, he still remains silent."

[3] California says the doctrine of collateral estoppel applies. See fn. pt. 4a, *People* v. *Griffin*.

fornia, permits a death penalty without proof of wilfulness or deliberation or any other of the defenses available in a charge of murder.

To try a person on one charge and convict him on another violates due process of law.

Cole v. *Arkansas*, 333 US 196, 92 L.ed. 644;
Thompson v. *Louisiana*, 362 US 199, 206, 4 L.ed.2d 654;
Garner v. *Louisiana*, 368 US 157, 7 L.ed.2d 207, 80 ALR 2d 1362.

IV.

Section 190.1 of the Penal Code of California, Inherently and as Construed and Applied in This Case, Violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution in Permitting the Introduction Before the Jury of Extraneous Matters on the Issues of the Penalty and Whether He Should Receive Life or Death.

Under the provisions of Section 190.1 of the Penal Code of California, the prosecutor is allowed to introduce evidence before the jury not of the crime itself but of many collateral matters regarding the whole life of the defendant: his conduct in prison, if he has been there, his arrest, whether he is a good or bad person or prisoner, and a number of matters entirely unrelated to the alleged crime of which he has been convicted. Such a statute unfairly allows the prosecutor to present many extraneous matters and base a judgment of life or death not upon the crime charged but upon the personality of the defendant and on other alleged crimes or acts not charged in any indictment or information. In this case, the prosecutor, under the court's construction, was allowed to bring in witnesses to

testify to a crime allegedly committed in another country and for which there was no process for the defendant to defend himself. A statute which permits this violates due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

The unfairness of this section under the due process clause of the Fourteenth Amendment to the Constitution of the United States is easily discernible on slight reflection. Section 190.1 of the Penal Code permits and has permitted the bringing in of all kinds of extraneous evidence, unrelated to the crime on trial, and often years after it happened. A man who has had another criminal charge against him or has served a term in the penitentiary some years before is easily defaced before a jury and the penalty to be adjudged merely from the nature of the crime itself is eliminated. This is certainly unfair and unequal justice. The power of the prosecution to bring in evidence adverse to a defendant is much greater than the power of a defendant to obtain evidence that would help him or would controvert the prosecution's evidence. Police officers are required to make reports and these are kept on file for years, "until the time when man's memory runneth not to the contrary". These reports thereafter can be dug up and referred to years later in the proceedings on the question of the penalty.

The average defendant must rely on the testimony of witnesses he can obtain at the time of trial. Unless testimony was perpetuated because the case was appealed, there is a strong probability that in a relatively short time such evidence would be unavailable and a one-sided presentation of a past event, unrelated to the defendant, is brought before the jury to decide whether the man should receive life or death. Thus prison records, including hearsay mat-

ters that relate to the inside, possible quarrels, reports regarding defendant about which he knew nothing and had no chance for hearing or trial, are dragged before the jury to show that the defendant is a bad man and should be executed.

Additionally, it should be noted that a citizen of another state or another country ordinarily would not be willing to come at a distance and further, to incur the possible ill will of local police officials by testifying against prosecution witnesses in another jurisdiction. This would be especially true if the local police of another area testified on the side of the prosecution in the case in question.

Over and above all this, the prosecution usually has ample funds and can justify the expenditure of government or state funds to obtain these witnesses, whereas very few defendants would ordinarily be financially able to pay the expenses necessarily incurred by their witnesses. The instant case before this Court is an example. It is in connection with this case that we contend Section 190.1 of the Penal Code of California is unconstitutional and in violation of due process of law and the equal protection of the laws. It was here that the prosecution, with its ample funds for obtaining witnesses at state expense, was able to bring witnesses from Mexico, whereas the indigent defendant was unable financially to do so.

In the instant case, it is also quite possible that the prosecution witness from Mexico, now having a second chance at revenge, would be inclined to magnify rather than minimize the offense against her. The defendant had no funds or process of court to call the witnesses here to rebut the testimony. Without a transcript of their previous testimony, it resulted in the word of the defendant against the witnesses the prosecution was able to produce. Justice Peters, in his dissent in this case, said:

> "Thus, these biased witnesses, who could not convince a court in their own country, who were not believed when the facts were fresh in their minds, were permitted to testify as to the circumstances of the case, while the defense was required to rely on defendant's unsupported and uncorroborated denial of these circumstances."

There could be little doubt that such unfair treatment was, in large measure, the instrument by which the death penalty resulted.

Conclusion

WHEREFORE, petitioner prays that the judgment be reversed.

Respectfully submitted,

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APPENDIX A

[Crim. No. 7309. In Bank. July 18, 1963.]

THE PEOPLE, Plaintiff and Respondent, v. EDDIE DEAN GRIFFIN, Defendant and Appellant.

[1a, 1b] *Homicide—Evidence—Murder.*—A conviction of first degree murder with the punishment fixed at death was supported by evidence that defendant persuaded a man to allow him to stay temporarily in the apartment the man shared with the victim, that defendant assaulted the victim during the night and failed to deny her accusation that he was trying to rape her, that defendant was put out of the apartment, returned, was led outside again by the man who was struck by defendant and went for aid, that defendant was later seen walking away from a large trash box in which the victim was found bruised and bleeding from wounds which caused her death, that defendant admitted that he began an act of intercourse with the victim in the apartment, entered the trash box with her with the intent of having intercourse, and did, in fact, have intercourse with her there, and that the injuries suffered by the victim were such that she would not have been likely to engage in a voluntary act of intercourse.

[2] *Criminal Law—Appeal—Questions of Law and Fact—Functions of Jury and Trial Court.*—In a criminal prosecution, the weight of the evidence is for the jury to determine in the first instance, and the trial court after the verdict in the second instance.

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[1] See *Cal.Jur.2d*, Homicide, § 323; *Am.Jur.*, Homicide (1st ed § 581).

McK. Dig. References: [1] Homicide, § 145(2); [2] Criminal Law, § 1310; [3] Criminal Law, § 1325; [4, 5] Criminal Law, § 1011.1; [6] Criminal Law, § 393(1); [7] Criminal Law, § 617; [8-11, 13] Criminal Law, § 632; [12] Criminal Law, § 621; [14] Criminal Law, § 1092.

[3] *Id.—Appeal—Questions of Law and Fact—Conflicting Inferences.*—If the circumstances reasonably justify the jury's verdict, the reviewing court's opinion that those circumstances might also reasonably be reconciled with the innocence of defendant will not warrant interference with the jury's determination.

[4a, 4b] *Id. — Judgment — Procedure for Determining Penalty.*—On the penalty phase of a murder prosecution in which it was implicit in the jury's verdict that the killing was committed during an attempted rape, it was proper to admit evidence relating to a similar offense committed by defendant in Mexico subsequent to the murder for which he was convicted, despite the fact that defendant had received the equivalent of an acquittal in Mexican proceedings brought against him as a result of such subsequent offense; the jury was entitled to consider defendant's recurrent behavior on the issue of punishment, for it might conclude that such behavior would probably or possibly recur again were defendant given a life sentence and ultimately paroled.

[5] *Id.—Judgment—Procedure for Determining Penalty.*—On the penalty phase of a criminal trial the doctrine res judicata and collateral estoppel do not apply to foreclose inquiry into relevant circumstances surrounding an earlier crime of which defendant was convicted, since the fact that his criminal responsibility for an earlier crime has been fixed does not justify denying to the jury charged with fixing the penalty for another crime relevant evidence bearing on that issue.

[6] *Id.—Evidence—Other Crimes.*—If evidence of another offense is otherwise admissible, the fact that defendant was acquitted does not render the evidence inadmissible; an acquittal is merely an adjudication that the proof at the prior proceeding was not sufficient to overcome all reasonable doubt of the accused's guilt.

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[6] See *Cal.Jur.2d*, Evidence, § 137; *Am.Jur.*, Evidence (1st ed § 312).

[7] *Id.—Conduct of Counsel—Concluding Arguments—Scope.*—A prosecutor may argue any matter helpful to his case as long as he confines himself to the record and those inferences that may reasonably be drawn therefrom.

[8] *Id.—Conduct of Counsel—Concluding Arguments—Penalty Phase of Case.*—On the penalty phase of a murder prosecution in which evidence had been admitted concerning an attempted rape by defendant in Mexico for which he received the equivalent of an acquittal, it was not misconduct for the prosecutor, in his argument to the jury, to characterize defendant's attack on the victim in Mexico as a crime.

[9] *Id.—Conduct of Counsel—Concluding Arguments—Penalty Phase of Case.*—On the penalty phase of a murder prosecution, it was not misconduct for the prosecutor to refer to defendant during his argument as one who, knowing that he had a venereal disease, would have sexual intercourse, where the record showed that defendant admitted that he had had both gonorrhea and syphilis, but such knowledge did not deter him from forcing his sexual attentions on the victim and another woman.

[10] *Id.—Conduct of Counsel—Concluding Arguments—Penalty Phase of Case.*—On the penalty phase of a murder prosecution, it was not misconduct for the prosecutor to argue that the jury could take into account the fact that defendant probably lied about his prior record to Mexican authorities when he was arrested for another offense where a document from the Mexican court was introduced into evidence at the specific request of the defense.

[11] *Id.—Conduct of Counsel—Concluding Arguments—Penalty Phase of Case.*—On the penalty phase of a murder prosecution, it was not misconduct for the prosecutor to argue that in the event the jurors re-

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[8] See *Cal.Jur.2d*, Trial, § 437; *Am. Jur.*, Trial (1st ed § 467).

turned a verdict of life imprisonment, it would be their responsibility if defendant was released and harmed anyone where the prosecutor was merely replying to defense counsel's argument that the jurors would be responsible if they returned a death sentence and it was subsequently established that defendant was innocent.

[12] *Id.—Conduct of Counsel—Concluding Arguments—Statements in Refutation.*—It is not misconduct for a prosecutor to reply to defense arguments as long as his comments are based on the record.

[13] *Id.—Conduct of Counsel—Concluding Arguments—Penalty Phase of Case.*—On the penalty phase of a murder prosecution, it was not misconduct for the prosecutor to argue that if any juror to the very end of the deliberations believed that the case was a proper one for the death penalty, he should adhere to his view rather than compromise his judgment, since such argument was a proper statement of the law relating to the duties of jurors in their deliberations; the right of a juror to disagree in good conscience with his fellow jurors is a matter of universal knowledge.

[14] *Id. — Appeal — Reserving Questions — Argument of Counsel.*—Defendant may not be heard to object on appeal to the prosecutor's argument to the jury on the penalty phase of the case where he made no objection at the time the argument was made and did not ask the trial court to instruct the jury to disregard it.

APPEAL, automatically taken under Pen. Code, § 1239, subd. (b), from a judgment of the Superior Court of Los Angeles County. Joseph L. Call, Judge. Affirmed.

Prosecution for murder. Judgment of conviction imposing the death penalty, affirmed.

Ellery E. Cuff and Erling J. Hovden, Public Defenders, Charles A. Maple and James L. McCormick, Deputy Public Defenders, for Defendant and Appellant.

Stanley Mosk, Attorney General, Albert W. Harris, Jr., and Robert R. Granucci, Deputy Attorneys General, for Plaintiff and Respondent.

McComb, J.—This is an automatic appeal, pursuant to section 1239, subdivision (b), of the Penal Code, after a jury found defendant guilty of first degree murder and fixed the penalty at death.

Defendant contends:

[1a] First. *That the evidence was insufficient to sustain his conviction.*

This contention is devoid of merit. December 2, 1961, defendant encountered Eddie Seay and a friend of Eddie's named Al on a street corner in Los Angeles and asked directions to the 41st Street Club, a nearby bar. After receiving the directions, defendant gave Eddie a quarter, which was applied toward the purchase of a bottle of wine.

About 9 o'clock Eddie and Al entered the 41st Street Club and sat in a booth with Essie Mae Hodson and two other people. Eddie had been living with Essie Mae since 1957 and referred to her as his common-law wife.

Defendant, who was standing at the counter, was invited to the booth to join Eddie and the group. They drank wine and beer through the evening until Al left. Essie Mae left about 1 o'clock, and Eddie and defendant remained in the bar until 2 o'clock. Eddie was fairly intoxicated and thought defendant was, also.

At defendant's request for a place to stay that night, Eddie took him to the apartment he shared with Essie Mae and told him he could sleep on a day bed in the living room. Eddie then retired to the bedroom with Essie Mae and went to sleep.

Later the noise of a struggle awakened Eddie, and he went into the living room, where Essie Mae told him, in defendant's presence, that she had gotten up to go to the bathroom and that defendant had put his hand over her mouth and tried to make her accept him.

Eddie advised defendant to go and drink some coffee, and took him down the back stairs. On the way downstairs defendant asked if he could come back upstairs and if Eddie would talk to Essie Mae for him. Eddie refused, took de-

fendant outside, and went back upstairs the front way, locking the door.

Five minutes later Eddie heard defendant knocking and calling and the sound of glass breaking as defendant let himself in the back door.

Eddie got up, put on a pair of trousers, went to the back, and again took defendant downstairs. Meanwhile, Essie Mae went out onto a balcony.

At the bottom of the stairs defendant hit Eddie two or three times, causing some injuries. Eddie was able to break away and ran over to the 41st Street Club, where someone he knew agreed to go with him back to the apartment building. They were unable to find Essie Mae, and Eddie never saw her alive again.

About 7 o'clock the next morning Alfredo Villasenor walked down an alley behind the apartment building, looking for a piece of scrap lumber. In the alley was a very large trash box containing several feet of sawdust and some scrap wood. Villasenor saw defendant come out of the box buttoning his trousers and asked him what he was doing. Defendant replied, "Nothing," and walked away.

Villasenor searched around for a piece of wood and finally looked into the box. There he saw Essie Mae. She had blood on her clothes, was trembling, and had apparently suffered a severe beating. Villasenor called to someone working in an adjacent trailer lot, who, in turn, called the police.

The officers found Essie Mae sitting on top of the sawdust in the box. She appeared to be under great shock, was bleeding from the head, and could barely state her name. There was mud on her face, her clothes were wet, and there was blood in the sawdust.

Essie Mae was taken to Central Receiving Hospital, barely conscious and unable to answer questions. She was treated for her injuries, namely, bleeding from the left middle ear; a skull fracture; bleeding bruises on the left side of her scalp, both eyes, forehead, and lips; a 3-inch cut in her scalp; multiple abrasions of her ankles, hip and back; and a lack of blood pressure.

Essie Mae died the next afternoon. An autopsy was performed the following day, and the cause of her death was

determined to be "subdural hematoma, which was operated with skull fracture."

An examination of her genital organs failed to disclose the presence of spermatozoa. The coroner testified, however, that this would not preclude the possibility of her having had intercourse late on the night of December 2 or early morning, December 3. He also testified that a woman with the extensive injuries suffered by her would be in great pain and it would be very difficult for such a person to engage in voluntary sex relations.

In addition, the prosecution produced expert testimony to the effect that the venereal disease commonly known as gonorrhea would destroy the ability of a male to produce spermatozoa. Defendant admitted to police officers that he had had both gonorrhea and syphilis.

There were blood stains at the foot of the back stairs, drag marks in the alley, and blood stains and a woman's wig in the sawdust box. Essie Mae had worn such a wig.

Defendant was arrested in Mexicali, and when questioned by officers freely and voluntarily told them that on the evening of December 2 he was at the 41st Street Club, where he met Essie Mae, Eddie, and some other people and had a number of drinks with them; that during the evening he gave Eddie a $10 bill with which to buy some wine; that Eddie disappeared with the change after an argument; that Essie Mae also left; that he inquired where they lived and went there; that Essie Mae let him in and, after some discussion, told him not to worry, that she would make good the missing change by letting him have intercourse with her; that they had just begun when Eddie came in the room and started a fight, in which Essie Mae joined and which continued down the back stairs and into the alley; that Eddie ran off; and that Essie Mae, even though she had been hit several times in the fight, took him to the trash box, where she voluntarily engaged in the intercourse. Defendant said he left the box when he heard Villasenor, who he thought was a watchman, pass by.

The foregoing evidence substantially sustained the findings of fact of the jury.

[2] In a criminal prosecution the weight of the evidence is for the jury to determine in the first instance, and the trial court after the verdict in the second instance. [3] If, as in the present case, the circumstances reasonably justify the verdict of the jury, an opinion of this court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. (*People* v. *Wein*, 50 Cal. 2d 383, 398 [13] [326 P.2d 457]; *People* v. *Newland*, 15 Cal.2d 678, 681 [104 P.2d 778].)

People v. *Craig*, 49 Cal.2d 313 [316 P.2d 947], and *People* v. *Granados*, 49 Cal.2d 490 [319 P.2d 346], are clearly distinguishable from the present case. In neither case was there direct or circumstantial evidence that the defendants had raped, or attempted to rape, their victims; and in the *Craig* case the only circumstantial evidence relative to that issue tended to the conclusion that the defendant did not attempt to perpetrate a rape (49 Cal.2d at p. 318 [2a, 3]).

Under those two cases, evidence that the defendant has brutally beaten or murdered his victim is insufficient to establish an intent to commit rape.

[1b] In the present case, the evidence is sufficient to establish an attempted rape.

First, there was evidence of defendant's assault on Essie Mae while she was in the apartment and his failure to deny her accusation that he was trying to rape her.

Second, defendant was seen buttoning his trousers as he walked away from the trash box, where Essie Mae sat bruised and bleeding. (Cf. *People* v. *Cheary*, 48 Cal.2d 301, 317 [20] [309 P.2d 431].)

Third, defendant admitted that he began an act of intercourse with Essie Mae in her apartment, entered the sawdust box with her with the intent of having intercourse, and did, in fact, have intercourse with her there. In this connection, the testimony of the autopsy surgeon that a woman with the injuries suffered by Essie Mae would not be likely to engage in a voluntary act of sexual intercourse is also important.

The facts which defendant asserts establish his innocence are equally consistent with his guilt.

[4a] Second. *That the evidence of defendant's assault on Amada Encinas was inadmissible on the issue of penalty.* This contention is likewise without merit. In the trial of the penalty issue the principal evidence produced by the prosecution related to a similar offense committed by defendant on December 19, 1961, in Mexicali, Mexico.

December 4, 1961, defendant left Los Angeles and traveled to Calexico, where he obtained a job at a cotton compress. There he met a man named Willie Kerr and told him his name was Willie Fairchild. Defendant told Kerr he did not have a place to stay, and Kerr let him have a room at the house which he shared with his common-law wife, Amada Encinas, across the border in Mexicali.

On December 19, 1961, while Amada was preparing lunch, defendant asked her for a towel. When she took it into his room, he grabbed her, hit and kicked her, tore her clothes off, and tried to rape her. He kicked her a number of times and so dislocated her arm that it had to be put in a cast for 15 days. He beat the woman severely, but despite the beating she refused to submit to him, and when Kerr arrived home, defendant jumped off the bed.

Kerr and defendant engaged in some kind of argument. Eventually the police were called, and Kerr and defendant were taken to jail. Defendant was brought to trial by a Mexican court on a charge of rape and released.

Defendant testified in his own behalf on the penalty issue of the trial. He gave an account of the incident involving Essie Mae Hodson roughly paralleling his story to the police officers, which story had been read at the trial on the issue of guilt, except that he denied having had intercourse with Essie Mae in the trash box.

His version of the incident involving Amada Encinas was that she had voluntarily agreed to have sexual intercourse with him for $2.00 and that her husband had come in and given her the beating.

Defendant contends that the trial court erred in admitting evidence, over his objection, of the assault on Amada Encinas, because a Mexican court had, in effect, found him not

guilty of that offense, and that its decision is res judicata on that issue.*

[5] It is established in this state that the doctrines of res judicata and collateral estoppel do not apply at the trial on the issue of penalty. In *People* v. *Purvis*, 52 Cal.2d 871, 881 [4] et seq. [346 P.2d 22], we held that on the penalty phase of a trial the rules of res judicata may not be invoked to foreclose inquiry into relevant circumstances surrounding an earlier crime of which a defendant was convicted, since the fact that his criminal responsibility for an earlier crime has been fixed does not justify denying to the jury charged with fixing the penalty for another crime relevant evidence bearing on that issue.

[4b] In the *Purvis* case the defendant had previously been convicted of the second degree murder of his wife. Upon his trial for the murder of another woman under circumstances markedly similar to those surrounding the killing of his wife, evidence respecting the latter killing was introduced on the issue of penalty. At page 882 [6] we said: "Moreover, in fixing the penalty for the murder of Mrs. Wilson, the jury was not bound by the former jury's finding that defendant's murder of his wife was of the second degree. Although that finding terminated defendant's liability to further prosecution for that crime, it was based on the evidence then before the jury that may have reflected only a reasonable doubt that a premeditated killing had occurred. Another killing as similar as the one that occurred here might dispel that doubt, and the jury fixing the penalty for the latter killing should be permitted to determine that issue on all the evidence before it without being bound by what another jury concluded on different evidence. In so doing, the second jury would not be redetermining defen-

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* Since the State of California and the Government of Mexico are not identical parties and were not in privity, and this proceeding is for a different offense, this case does not involve the doctrine of res judicata but, rather, collateral estoppel. (Cf. *Teitelbaum Furs, Inc.* v. *Dominion Ins. Co., Ltd.*, 58 Cal.2d 601, 604 [1] [25 Cal.Rptr. 559, 375 P.2d 439]; 29 Cal.Jur.2d (1956) Judgments, § 215, p. 169.)

dant's criminal responsibility for the killing of his wife, but fixing the penalty for his killing of Mrs. Wilson."

The same principle is applicable here. Implicit in the verdict of the jury was a finding that the killing was committed during an attempted rape; and in fixing the penalty for such killing, this jury was entitled to consider the circumstances surrounding the crime of which defendant was accused in Mexico, there being a marked similarity between the circumstances surrounding the two attacks.

In each instance defendant had persuaded the man with whom the woman was living to allow him to stay temporarily in the home they were sharing; while defendant was in a room alone with the woman and the man was either away from the house or asleep in another room, he tried to induce the woman to have sexual relations with him and, when she refused, beat her severely. In each instance he contended that the woman had voluntarily agreed to have intercourse with him for a sum of money.

As stated in *People* v. *Purvis, supra*, at page 881 [5]: "... The jury was entitled to consider this recurrent behavior on the issue of punishment, for it might conclude that the behavior would probably or possibly recur again were defendant given a life sentence and ultimately paroled."

The fact that defendant may have received the equivalent of an acquittal in the Mexican proceedings is immaterial. [6] An acquittal is merely an adjudication that the proof at the prior proceeding was not sufficient to overcome all reasonable doubt of the guilt of the accused. (*In re Anderson*, 107, Cal.App.2d 670, 672 [237 P.2d 720] [hearing denied by the Supreme Court]; cf. *Teitelbaum Furs, Inc.* v. *Dominion Ins. Co., Ltd., supra*, 58 Cal.2d 601, 605.) Accordingly, if evidence of another offense is otherwise admissible, the fact that the defendant was acquitted does not render the evidence inadmissible. (*People* v. *Massey*, 196 Cal.App. 2d 230, 234 [4] [16 Cal.Rptr. 402]; *People* v. *Crisafi*, 187 Cal.App.2d 700, 707 [10 Cal.Rptr. 155] [hearing denied by the Supreme Court].) Third. *That the prosecution was guilty of prejudicial misconduct in its argument to the jury on the issue of penalty.*

Defendant contends that it was error for the prosecutor to argue (1) that defendant had committed a crime in Mexicali; (2) that defendant, knowing he had a venereal disease, had sexual intercourse with women; (3) that defendant probably lied about his prior record to the Mexican authorities; and (4) that the jury would be responsible if defendant was paroled and then killed, raped, or infected anybody; he also contends (5) that the prosecutor improperly asked the jurors to hold out for the death penalty.

[7] It is settled that the prosecutor may argue any matter helpful to his case as long as he confines himself to the record and those inferences which may reasonably be drawn therefrom. (*People* v. *Atchley,* 53 Cal.2d 160, 174 [14, 15] [346 P.2d 764]; *People* v. *Cheary, supra,* 48 Cal.2d 301, 317 [20, 21]; *People* v. *Burwell,* 44 Cal.2d 16, 39 [33] [279 P.2d 744].)

Applying the foregoing rule, it is apparent that defendant's claims of error are without merit.

[8] First, it was not misconduct to characterize defendant's brutal attack on Amada Encinas as a crime.

[9] Second, the prosecutor's reference to defendant as one who, knowing that he had a venereal disease, would have sexual intercourse is supported by the record. Defendant admitted that he had had both gonorrhea and syphilis, but this knowledge did not deter him from forcing his sexual attentions upon Essie Mae Hodson and Amada Encinas.

[10] Third, the document from the Mexican court was introduced in evidence at the specific request of the defense, and the prosecutor could properly argue that the jury could take into account the fact that defendant may have made untrue statements to the Mexican authorities about his record at the time he was booked.

[11] Fourth, it was not improper for the district attorney to argue that in the event the jurors returned a verdict of life imprisonment, it would be their responsibility if defendant was released and harmed anyone. He was merely replying to defendant's argument that the jurors would be responsible if they returned a death sentence and it was

subsequently established that defendant was innocent. [*12*] It is not misconduct for a prosecutor to reply to defense arguments as long as his comments are based on the record, as were these. (*People* v. *Rosoto*, 58 Cal.2d 304, 364 [73] [23 Cal.Rptr. 779, 373 P.2d 867].)

[*13*] Fifth, it was not misconduct for the prosecutor to argue that if any juror to the very end of the deliberations believed that this was a proper case for the death penalty, he should adhere to his view rather than compromise his judgment. This was a proper statement of the law relating to the duties of jurors in their deliberations. The right of a juror to disagree in good conscience with his fellow jurors is a matter of universal knowledge. (*People* v. *Wade*, 53 Cal.2d 322, 332 [10] [1 Cal.Rptr. 683, 348 P.2d 116]; *People* v. *Wong Loung*, 159 Cal. 520, 535 [114 P. 829]; *People* v. *Tate*, 124 Cal.App. 48, 50 [2] [12 P.2d 102].)

[*14*] In addition, defendant may not now be heard to object to the district attorney's argument, since he made no objection at the time it was made and did not ask the trial court to instruct the jury to disregard it. (*People* v. *Robillard*, 55 Cal.2d 88, 102 [21] [10 Cal.Rptr. 167, 358 P.2d 295, 83 A.L.R.2d 1086]; *People* v. *Turville*, 51 Cal.2d 620, 636 [20] [335 P.2d 678].)

It is apparent that there is no error in the record.

The judgment is affirmed.

Gibson, C. J., Traynor, J., Schauer, J., Tobriner, J., and Peek, J., concurred.

PETERS, J., Concurring and Dissenting.—I agree with the majority that the portion of the judgment finding defendant guilty of murder in the first degree is supported by substantial evidence and should be affirmed. But, in my opinion, the portion of the judgment imposing the death penalty should be reversed, because inadmissible evidence that was prejudicial was erroneously introduced on that phase of the trial.

Preliminarily it should be pointed out that the determination of whether the death penalty or life imprisonment shall be imposed rests solely in the discretion of the jury.

The presence of aggravating circumstances is not necessary to impose the death penalty, nor need there be ameliorating circumstances to warrant the jury in imposing a life sentence. It follows that, if any major error on this phase of the trial in the introduction of evidence occurs that has any relationship to the character of defendant, such error must be held to have been prejudicial. Just such an error, in my opinion, here occurred.

On the guilt phase of the trial the prosecution produced evidence that the victim died after being brutally beaten and raped by defendant. Then, on the penalty phase of the trial, the prosecution, over objection, was permitted to introduce evidence that shortly after the offense here was committed, and while defendant was still at large, he brutally beat and tried to rape a woman in Mexico under circumstances remarkably similar to the beating and rape here involved. The prosecution was permitted to introduce full and complete evidence concerning the details of this claimed other offense. As pointed out by the majority this was the "principal evidence produced by the prosecution" on this phase of the trial. It permitted the prosecution to argue that if defendant committed this second offense he was the type of brutal and dangerous man that should never again be at liberty and should suffer the death penalty. If defendant had actually committed this offense in Mexico, the evidence would clearly have been admissible under the "common plan" exception to the general rule excluding evidence of other crimes. That is what most of the cases cited by the majority hold. But if defendant had not committed this crime in Mexico, permitting the prosecutor to argue and this jury to find that he had, and use this fact as the basis of imposing the death penalty, was gravely prejudicial. The obvious purpose of this evidence was to show the jury that defendant was habitually the kind of man that went around beating and raping women, and should never again be at large. It permitted this jury to, in effect, find that defendant, in fact, had committed this other crime, and therefore should die.

Defendant denied having committed the Mexican offense. This created no more than a conflict in the evidence. But the real question is whether defendant had committed this

crime. It had been judicially determined in Mexico that there was not sufficient evidence to show that defendant had committed the offense. As the majority correctly point out, "[d]efendant was brought to trial by a Mexican court on a charge of rape and released," that is, acquitted. But, in the prosecution in Los Angeles, the two principals in the Mexican case were permitted to testify to the very facts that had led the Mexican court and investigating officials to release the defendant. Defendant was compelled to rely on his version of the facts, unsupported by corroborating testimony. The credibility of the prosecution witnesses had already been judicially passed on adversely in Mexico. But now the defendant was called upon to once again face those very same witnesses. He was called to answer the argument of the prosecution that the Mexican court had "made a mistake" and "I ask you ladies and gentlemen not to perpetuate the error." The prosecuting attorney several times told the jury that through his Mexican witnesses he had demonstrated that defendant had committed the offense in Mexico. The jury was told by the rulings on the evidence, and the arguments of the prosecutor, that it could not only believe these witnesses who testified as to the Mexican offense, but that it could, in effect, determine for itself whether the Mexican offense had been committed. They were told by the prosecutor that, if they came to the conclusion that the offense had been committed, they could consider that fact in determining what penalty to impose. This was unfair and deprived defendant of a fair trial on the penalty issue.

The general rule is, of course, that evidence of other offenses is not admissible. To this rule there are several exceptions—but all of them relate to "other offenses." It is a far cry from the general rule to now hold, as do the majority, that, even though the defendant has been acquitted of the prior charge, evidence that he in fact committed the offense is now admissible. I realize that the rules of evidence and the proper scope of inquiry, on the penalty phase of the trial, are very broad. By section 190.1 of the Penal Code, on that phase of the trial, evidence "of the defendant's background and history," can be admitted. This court, quite properly, has interpreted this provision very

liberally, both for defendant and the prosecution. Under the broad provisions of this section it is proper to inquire into all facets of the character of defendant and to show the jury just what kind of man he is. Under this liberal rule of admission it may be that the prosecution on the penalty phase of the trial could introduce the fact that defendant had been *charged* in Mexico with rape and that he had been acquitted. That is part of his background and history. But to detail the circumstances of the alleged crime through the mouths of witnesses that had not been believed in Mexico was to place the defendant in double jeopardy for the same offense in a very real sense. If there is to be a collateral estoppel against a defendant (*Teitelbaum Furs, Inc.* v. *Dominion Ins. Co., Ltd.*, 58 Cal.2d 601, 604 [25 Cal.Rptr. 559, 375 P.2d 439]) there should also be a collateral estoppel in his favor.

Aside from this reason why detailed evidence of other crimes alleged to have been committed in a foreign country where defendant has been acquitted in that country should not be admitted, there is another sound practical consideration that compels the exclusion of such testimony. Indigent defendants who have to be represented by the public defender, as did defendant here, are not in a position of financial equality with the prosecution, nor do they have the same means of persuasion as does the prosecution. This court and the United States Supreme Court, in a whole series of recent cases, and properly so, have been quite zealous in protecting the rights of indigent defendants against improper invasion. The defense is in no position, as is the prosecution, to induce witnesses to come to this country to testify. In this very case, the record shows that the public defender's office, with its limited resources, did send an investigator to Mexico to try and induce the Mexican trial judge, and the Mexican investigating officers, to come to Los Angeles to testify, even offering to pay their expenses. The witnesses would not come. There was no way to compel them to come. But the prosecution could and did induce the two principals in the Mexican court to come to Los Angeles to testify. Thus, these biased witnesses, who could not convince a court in their own country, who were not believed when the facts were fresh in their

minds, were permitted to testify as to the circumstances of the case, while the defense was required to rely on defendant's unsupported and uncorroborated denial of these circumstances. Thus, the rule, approved by the majority, results in a denial of due process and a denial of that fair trial guaranteed by the state and federal Constitutions.

I would send the case back for a retrial of the penalty issue.

APPENDIX B

Constitutional Provisions and Statutes Involved

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1915, Code of Civil Procedure of California:

> A final judgment of any other tribunal of a foreign country having jurisdiction, according to the laws of such country, to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this state.

Section 187, Penal Code of California:

> Murder defined. Murder is the unlawful killing of a human being, with malice aforethought.

Section 189, Penal Code of California:

All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

Section 190, Penal Code of California:

Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, and every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.

Section 190.1, Penal Code of California:

The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the com-

mission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty.

In any case in which defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial of the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury.

Article 1, Section 13, California Constitution:

In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial.

Subject Index

Table of Authorities Cited

Cases

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 202

EDDIE DEAN GRIFFIN,
Petitioner,
vs.
STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The decision and opinion of the Supreme Court of California is reported in 60 Cal.2d 182, 32 Cal.Rptr. 24, and 383 P.2d 432.

JURISDICTION

The jurisdiction of this Court was invoked under 28 U.S.C. § 1257(3). Petition for a Writ of Certiorari to the Supreme Court of California was granted on June 22, 1964.

QUESTIONS PRESENTED

1. Whether the limited comment upon, and consideration of, a defendant's failure to explain or deny evidence produced against him, whether he testifies or not, authorized by Article I, Section 13 of the Constitution of California contravenes the privilege against compulsory self-incrimination afforded by the Fifth Amendment.

2. Whether the presentation during the penalty phase of petitioner's trial of testimony concerning an assault committed by him in Mexico even though he had been acquitted of that offense in Mexico deprived him of due process of law or denied him equal protection of the law.

3. Whether the conviction is so lacking in evidentiary support as to violate due process of law.

STATEMENT OF THE CASE

On May 22, 1962, an information charging petitioner with the murder of Essie Mae Hodson on or about the 4th day of December, 1961, was filed by the District Attorney for the County of Los Angeles, State of California (CT 3).

On June 1, 1962, petitioner, represented by the Public Defender for the County of Los Angeles (as he was through his trial and his appeal to the Supreme Court of California), was arraigned and entered a plea of not guilty (CT 7).

On August 27, 1962, the information was amended to include allegations of two prior felony convictions which convictions petitioner admitted (CT 9). One was a conviction in Illinois in May, 1946, of the crime of rape and the other was a conviction in Illinois in September, 1955, of the crime of being a sexually dangerous person (CT 4). During the course of trial the second prior conviction was stricken on petitioner's motion (CT 78).

On October 9, 1962, the cause came on for jury trial (CT 9). Trial on the issue of guilt was had for seven days (CT 9-15) and on October 19, 1962, the jury returned a verdict finding petitioner guilty of murder in the first degree (CT 19, 77).

Trial on the issue of penalty commenced on October 24, 1962, and was had for four days (CT 78-81). On November 2, 1962, the jury decided petitioner should suffer the extreme penalty (CT 83, 86).

The Supreme Court of California affirmed the conviction on July 18, 1963, and on August 14, 1963, denied a petition for a rehearing.

STATEMENT OF FACTS

Trial On The Issue Of Guilt.

On the evening of Saturday, December 2, 1961, petitioner Griffin encountered Eddie Seay and a friend of Eddie's named Al on a street corner and asked directions to the 41st Street Club, a nearby bar (RT 63, 101). Eddie gave petitioner the directions, and

petitioner gave him a quarter, which he and Al used to help buy a bottle of wine (RT 63, 105-107).

At about nine o'clock Eddie and Al returned to the 41st Street Club (they had been there earlier that evening), and sat in a booth with Essie Mae Hodson, the victim, and two other people (RT 64, 109-110, 113-14). Eddie had been living with Essie Mae since 1957 and referred to her as his common-law wife (RT 82, 86).

Petitioner, who was standing at the counter, was invited over to the table to join Eddie and the group (RT 64, 114). They drank wine and beer through the evening until Al left and then Essie Mae left at about one o'clock (RT 65, 120). Eddie and petitioner remained in the bar until two o'clock; Eddie was fairly intoxicated and thought petitioner was too (RT 115, 123-24). At petitioner's request for a place to stay that night, Eddie took him home to the apartment he shared with Essie Mae and told him he could sleep on a day bed in the living room (RT 66-68, 69, 117, 126). Eddie then retired to the bedroom with Essie Mae and went to sleep (RT 69, 131).

Later the noise of a struggle awakened Eddie and he went into the livingroom where Essie Mae told him, in petitioner's presence, that she had gotten up to go to the bathroom and that petitioner had put his hand over her mouth and tried to make her accept him (RT 69-71, 133, 135-37, 211).

Eddie asked petitioner to go and drink some coffee and took him down the back stairs (RT 71, 138, 142).

On the way downstairs petitioner asked if he could come back upstairs and if Eddie would talk to Essie Mae for him (RT 72, 147). Eddie refused, took petitioner outside and went back upstairs the front way, locking the door (RT 72-73, 147-48).

Five minutes later Eddie heard petitioner knocking and calling and the sound of glass breaking as petitioner let himself in through the back door (RT 73-74, 148-151). Eddie got up and put on a pair of trousers, went to the back, took petitioner by the arm and brought him downstairs (RT 74-75, 152, 154, 156-57, 159). Meanwhile Essie Mae went upstairs and called to the occupant of Apartment Number 3, a man named Tommy (RT 163-65). At the bottom of the stairs petitioner hit Eddie two or three times, causing some injuries (RT 76-77, 166-167, 218).

Eddie was able to break away and ran over to the 41st Street Club where an acquaintance named Piggy agreed to go back to the apartment building (RT 77, 174-75). They were unable to find Essie Mae (RT. 175-80) and Eddie never saw her alive again (RT 78).

At about seven o'clock the next morning, Alfredo Villasenor walked down the alley that runs behind the apartment building (RT 9, 24-25). He was looking for a piece of scrap lumber (RT 9-10, 23). In the alley was a very large trash box containing several feet of sawdust and scrap wood (RT 11-12, 376-77, 409).

Villasenor saw petitioner come out of the box, buttoning his trousers (RT 10, 11, 12, 14, 25-26, 29-34).

He asked petitioner what he was doing; petitioner said "nothing" and walked away (RT 12, 27-28). Villasenor searched around for his piece of wood and finally looked into the box. There he saw Essie Mae. There was blood on her clothing, she was trembling and apparently had suffered a severe beating (RT 12, 14, 35-36, 43, 46-47).

Villasenor called to someone working in an adjacent trailer lot who in turn called the police (RT 13). The responding officers found Essie Mae sitting on top of the sawdust in the box (RT 27-28). She appeared to be under great shock, was bleeding from the head, and could barely state her name (RT 229, 241). There was mud on her face and her clothes were wet (RT 230, 243). There was blood in the sawdust (RT 232, 237-38).

Essie Mae was taken to Central Receiving Hospital (RT 230-31, 246). She was barely conscious and unable to answer questions (RT 474, 480). There she was treated for her injuries; namely, bleeding from the left middle ear, a skull fracture, bleeding bruises on the left side of her scalp, both eyes, forehead and lips, a three-inch cut in her scalp, multiple abrasions of her ankles, hip and back, and a lack of blood pressure (RT 474-476, 486-490).

Essie Mae died the next afternoon, December 4, at about four o'clock (RT 262). The cause of her death was subdural hematoma, which had not been caused by surgery (RT 249, 267, 273). Although an examination of her genital organs failed to disclose the presence of spermatozoa (RT 274), this would not exclude

the possibility of her having had intercourse late Saturday night or early Sunday morning (RT 274-76, 349-50). The coroner testified that a woman with the extensive injuries suffered by Essie Mae (see RT 250-56, 259-62, 264, 269-72), would be in great pain and it would be very difficult for her to engage in voluntary sex relations (RT 354-55).

Police officers investigating the homicide found blood stains at the foot of the back stairs (RT 382), drag marks in the alley (RT 382-83), and blood stains and a woman's wig in the sawdust box (RT 377, 385). Essie Mae wore a wig (RT 149).

Petitioner, when he was questioned by these officers in Mexicali (RT 387), freely and voluntarily told them (RT 386) that on the evening of December 2nd he was at the 41st Street Club, where he met Essie Mae, Eddie and some other people and had a number of drinks with them (RT 388-91); that during the evening he gave Eddie a ten dollar bill with which to buy some wine and that Eddie disappeared with the change after an argument (RT 391, 392, 394-395); that Essie Mae also left and that he inquired where they lived and went there (RT 396); that Essie Mae let him in and, after some discussion, told him not to worry, that she would make good the missing change by letting him have intercourse with her (RT 398-400); that they had just begun when Eddie came in the room and started a fight in which Essie Mae joined and which continued down the back stairs and into the alley (RT 403-407, 417-418); that Eddie ran off and that Essie Mae, even though she had been hit

several times in the fight, took him to the trash box (RT 409-411) where she voluntarily engaged in sexual intercourse (RT 411:6-8, 411:26-412:1, 414:6-10). Petitioner said he left the box when he heard Villasenor, who he thought was a watchman, come by the box (RT 414-15).

Petitioner did not testify at the trial on the issue of guilt and the defense consisted in the main of testimony of witnesses who to some extent contradicted Eddie's version of the events of the Saturday evening at the 41st Street Club (RT 523-32, but see RT 541), and also his account of what happened at the club the next morning (RT 566-568).

Trial On The Issue Of Penalty.

The principal evidence produced by the prosecution related to a similar offense committed by petitioner on December 19, 1961, in Mexicali, Mexico. On Monday, December 4, petitioner left Los Angeles and travelled to Calexico where he obtained a job at a cotton compress (RT 858-63, 882). There he met a man named Willie Kerr and told him his name was Willie Fairchild (RT 728, 862). Petitioner told Kerr he did not have a place to stay and Kerr let him have a room at the house which he shared with his common-law wife, Amanda Encinas, across the border in Mexicali (RT 727-28). Petitioner stayed eight days with Kerr and Amanda (RT 689-690).

On the morning of December 19, 1961, Amanda was preparing lunch when petitioner came into the kitchen and asked for a towel (RT 691). When she took it

into petitioner's room, he grabbed her, hit and kicked her, tore her clothes off and tried to rape her (RT 691-92, 693, 707-08). He kicked her a number of times (RT 694) and so dislocated her arm that it had to be put in a cast for fifteen days (RT 695). He beat the woman severely (RT 693, 695-96, 708). Despite the beating Amanda refused to submit to petitioner (RT 696), and when Kerr arrived home petitioner jumped off the bed (RT 692).

Kerr and petitioner engaged in some sort of argument and eventually the police were called and Kerr and petitioner were taken to jail (RT 717, 722, 734, 749, 870). Petitioner was brought to trial by a Mexican court on a charge of rape and released (RT 659-60, 876-77).

In an apparent attempt to explain the absence of spermatozoa in Essie Mae's private parts (RT 274), the prosecution produced expert testimony for the proposition that the venereal disease commonly known as gonorrhea would destroy the ability of a male to produce spermatozoa (RT 684, 685). Petitioner admitted to the police officers that he had had gonorrhea (RT 784-785).

Petitioner testified on his own behalf at the penalty phase. He gave an account of the incident involving Essie Mae Hodson which roughly paralleled his story to the police officers that had been read at the trial on the issue of guilt except that he denied having intercourse with Essie Mae in the trash box (see RT 803-15). His version of the incident involving Amanda Encinas was that she had voluntarily agreed to have

sexual intercourse with him for $3.00 and that her husband had come in and given Amanda the beating (RT 868-874). He testified that he had had syphilis (RT 882). He had a prior armed robbery conviction in Michigan in 1943 (RT 798-99) and an Illinois rape conviction in 1946 (RT 799).

SUMMARY OF RESPONDENT'S ARGUMENT

I

The provisions in Article I, section 13 of the California Constitution sanctioning comment upon, and consideration of, a criminal defendant's failure to explain or deny evidence presented against him, whether he testifies or not, does not contravene the Fifth Amendment privilege against self-incrimination and indeed is perfectly consistent with recognition of the privilege.

Since its first Constitution in 1850, California has afforded to criminal defendants a privilege against compulsory self-incrimination. Since the 1934 Amendment to Article I, section 13 which added the above mentioned provision, California has sanctioned limited comment upon, and consideration of, a defendant's failure to testify as consistent with the privilege. Both in *Twining v. New Jersey*, 211 U.S. 77 (1908) and in *Adamson v. California*, 332 U.S. 46 (1947), this Court recognized that a state could reasonably conclude that a rule of law sanctioning comment upon a defendant's failure to testify was consistent with the privilege against self-incrimination.

Nor does the fact that a no comment rule is followed in the federal courts mean that a preclusion from comment on a defendant's failure to testify is a necessary concomitant of the Fifth Amendment privilege. When this Court first articulated the federal no comment rule in *Wilson v. United States*, 149 U.S. 60 (1893), it predicated it not upon the Fifth Amendment but rather upon a statute which, while making a defendant competent to testify if he so requested, declared his failure to testify was to create no presumption against him. The rule enunciated in *Wilson* was established by this Court in its supervisory rule over the federal courts and the statute there construed represented a legislative policy determination by Congress.

But a legislative policy determination regulatory of the federal courts should not be imposed by this Court upon the states as a constitutional mandate. Each state should be free, within the limitations of due process, to decide whether, as a matter of policy, it will permit, as consistent with the privilege, comment upon a defendant's failure to testify.

While a large majority of the states have concluded that comment upon a defendant's failure to testify should not be permitted, several states have concluded that such comment may and should be permitted.

And, certainly the decision by such states to permit comment cannot be characterized as illogical since, as a practical matter, juries will not be oblivious to the fact that a defendant does not testify. Indeed, those states which define in a logical manner a limited scope

of permissible consideration of this patent fact confer a benefit upon those defendants who do not testify.

II

In view of the goals of modern penology, that is that punishment should fit the offender and not merely the crime, wide latitude must be afforded to a sentencing body with regard to the type of information concerning the background and history of an offender which it may properly consider.

More specifically, in view of the significance of other criminal conduct in this regard, a state may, quite consistent with the federal Constitution, permit a sentencing body to consider evidence concerning some other crime notwithstanding the fact that the offender may have been acquitted of the other offense.

Rules of res judicata are simply not appropriate to a penalty proceeding. The fact that a defendant is acquitted of an offense does not mean that he did not commit the offense but only that the evidence was not sufficient to convince the trier of fact beyond a reasonable doubt. Such a failing in an earlier proceeding should not preclude a sentencing body from considering information necessary to it if it is to make an intelligent determination as to sentence.

ARGUMENT

I

THE PROVISION IN ARTICLE I, SECTION 13 OF THE CALIFORNIA CONSTITUTION PERMITTING COMMENT UPON, AND CONSIDERATION OF, A DEFENDANT'S FAILURE TO EXPLAIN OR DENY BY HIS TESTIMONY EVIDENCE PRESENTED AGAINST HIM DOES NOT CONTRAVENE THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION.

Petitioner attacks the constitutionality of the provision in Article I, section 13 of the California Constitution which permits comment upon, and consideration of, the failure of a defendant to explain or deny evidence presented against him. Since this Court has now held that the Fifth Amendment privilege against compulsory self-incrimination is protected by the Fourteenth Amendment against abridgment by the states, *Malloy v. Hogan*, 378 U.S. 1 (1964), the question left unanswered by *Adamson v. California*, 332 U.S. 46 (1947), is squarely presented by this case, namely:

> Is the privilege against compulsory self-incrimination violated by the provision in the California Constitution which authorizes limited comment upon, and consideration of, a defendant's failure to explain or deny by his testimony evidence presented in the case against him?

The language in the Fifth Amendment setting out the privilege against compulsory self-incrimination. "No person . . . shall be compelled in any criminal case to be a witness against himself," is reflected verbatim in Article I, section 13 of the California Constitution. Since its first constitution in 1850, Cali-

fornia has recognized and afforded to criminal defendants the privilege against compulsory self-incrimination so basic to the tradition of the Common Law. Calif. Const., art. I, § 8 (1850). Nor is the limited comment and consideration sanctioned by California since the 1934 Amendment to Article I, section 13, inconsistent with recognition of the privilege against compulsory self-incrimination.[1]

A. The Federal No Comment Rule Is The Product Of Statute, It Does Not Follow Necessarily From The Fifth Amendment Privilege Against Compulsory Self-Incrimination, And It Should Not Be Imposed By This Court Upon The States As A Constitutional Rule Of Law.

When this Court first articulated the federal no comment rule, it predicated it, not upon the Fifth Amendment, but rather upon a federal statute which, while conferring upon a defendant the right at his request to appear as a witness on his own behalf, also declared that his failure to so request "shall not create any presumption against him." *Wilson v. United States*, 149 U.S. 60 (1893); see also *Bruno v. United States*, 308 U.S. 287 (1939).

This statute upon which the federal no comment rule is predicated (28 U.S.C. § 3481) represents a policy decision by Congress as to the manner in which the privilege against self-incrimination is to be protected in the federal courts. *Stewart v. United States*, 366 U.S. 1, 2 (1961). But this legislative policy de-

[1]Prior to the amendment California had precluded comment on a defendant's failure to testify. *People v. Tyler*, 36 Cal. 522 (1869); *People v. Adamson*, 27 Cal.2d 478, 487, 165 P.2d 3, 8 (1946).

termination regulatory of the federal courts should not be imposed upon the states as a constitutional mandate. *Cf. Ker v. California*, 374 U.S. 23, 31-32 (1963).

In *Twining v. New Jersey*, 211 U.S. 77 (1908), this Court recognized that a state could, consistent with the privilege against self-incrimination, allow comment upon a defendant's failure to testify when it said at page 114:

> "We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. We do not intend, however, to lend any countenance to the truth of that assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself, and not a denial of it. The reasoning by which this view is supported will be found in the cases cited from New Jersey and Maine, and see Queen v. Rhodes [1899] 1 Q. B. 77; Ex parte Kops [1894] A.C. 650. The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, we think that the exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution."

Similarly in *Adamson v. California*, *supra*, while assuming for purposes of the decision that the comment sanctioned by the California procedure would, if it occurred in a federal prosecution, infringe the defendant's privilege against self-incrimination under

the Fifth Amendment, this Court said in footnote 6 at 332 U.S. 50:

> "The California law protects a defendant against compulsion to testify, though allowing comment upon his failure to meet evidence against him. The Fifth Amendment forbids compulsion on a defendant to testify. [Citations]. A federal statute that grew out of the extension of permissible witnesses to include those charged with offenses negatives a presumption against an accused for failure to avail himself of the right to testify in his own defense. [Citations]. It was this statute which is interpreted to protect the defendant against comment for his claim of privilege. [Citations]."

That a rule precluding comment upon or consideration of a defendant's failure to testify is not a necessary consequence of recognition of the privilege against self-incrimination is persuasively shown by the fact that nearly every state has felt compelled to treat specifically with the comment and consideration problem, either by constitution or statute. See generally 8 Wigmore, Evidence (McNaughton Rev. 1961) § 2272, p. 427, fn. 2. While a large majority of the states do follow a no comment rule, the decision to do so is almost invariably predicated upon language, either in constitution or statute, which forbids comment upon a defendant's failure to testify, or forbids that any presumption or inference be drawn from such failure to testify, or which declares that a defendant's failure to testify shall not prejudice him. *Ibid; Adamson v. California, supra,* 55.

Persuasive authority for the proposition that a rule sanctioning comment and consideration is not inconsistent with recognition of the privilege against self-incrimination is also found in the decisions from those states which, while recognizing the privilege, do permit comment upon and/or consideration of a defendant's failure to testify.

Connecticut sanctions instructions to the jury on the failure of an accused to testify notwithstanding a constitutional provision that an accused shall not be compelled to give evidence against himself and a statute which provides that the neglect or refusal of an accused party to testify shall not be commented upon to the court or jury. *State v. Hayes,* 127 Conn. 543, 18 A.2d 895, 918-19 (1941). Connecticut also permits adverse inferences to be drawn from a defendant's failure to testify once the state has made out a prima facie case of guilt. *State v. Del Vecchio,* 145 Conn. 549, 145 A.2d 199, 200 (1958).

Iowa, which has no constitutional provision specifically providing for the privilege against self-incrimination, construes its due process provision as including the right against self-incrimination, see *e.g. Koonch v. Cooney,* 244 Iowa 153, 55 N.W.2d 269, 271 (1952); *State v. Height,* 117 Iowa 650, 91 N.W. 935, 936-40 (1902). And, Iowa permits comment upon a defendant's failure to testify finding sanction for such procedure in an amendment to its statutory treatment of the problem which deleted language to the effect that a defendant's failure to testify should have no weight against him and should not be the subject of

comment. *State v. Ferguson,* 226 Iowa 361, 283 N.W. 917, 918-19 (1939).

New Jersey, which also has no constitutional provision setting out a privilege against self-incrimination, has treated the privilege as one of statutory origin. See *State v. White,* 27 N.J. 158, 142 A.2d 65, 70 (1958). Yet as consistent with recognition of the privilege, it follows a rule which permits, from the failure of an accused to testify, the drawing of an inference that he could not truthfully deny the inculpatory facts adduced against him. *State v. Corby,* 28 N.J. 106, 145 A.2d 289, 295 (1958).

Ohio has a specific constitutional provision setting out the privilege against self-incrimination which also sanctions consideration by the court and jury and comment by court and counsel upon the failure of an accused to testify. Ohio Const., art. 1, § 10. This sanction for consideration and comment which is also provided for by statute has received the approval of the Ohio Court of Appeals. *Halsey v. State,* 42 Ohio App. 291, 182 N.E. 127, 128-29 (1932); *State v. Parks,* 105 Ohio App. 208, 152 N.E.2d 154, 156-57 (1957).

New Mexico has a constitutional provision to the effect that no person shall be compelled to testify against himself in a criminal proceeding. New Mexico Const., art. 2, § 15. In deciding a question virtually identical to the one now confronting this Court, the Supreme Court of New Mexico held that a court rule which sanctioned comment and argument upon the failure of an accused to testify does not violate and

is not inconsistent with the constitutional privilege against self-incrimination. *State v. Sandoval,* 59 N.M. 85, 279 P.2d 850, 852-53 (1955).[2]

Further authority for the proposition that comment upon and consideration of a defendant's failure to testify is not inconsistent with the privilege against compulsory self-incrimination is found in the Uniform Rules of Evidence and in the Model Code of Evidence, both of which sanction comment upon and consideration of the failure of an accused to testify. Uniform Rules of Evidence 23(4); Model Code of Evidence rule 201(3) (1942).

We submit that the decision as to whether or not comment and consideration is to be permitted as to a defendant's failure to testify is a policy determination which each state should be free to resolve within the bounds of due process and that a preclusion from such comment and consideration is not necessary to compliance with the Fifth Amendment privilege against self-incrimination.

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[2]This decision is representative of the realistic modern approach to this question. The Vermont Supreme Court in 1947 reached the same result after extensive analysis and comment upon some earlier cases from other states which had reached a contrary result. *State v. Baker,* 115 Vt. 94, 53 A.2d 53, 56-63 (1947). Earlier the South Dakota Supreme Court by a 3-2 decision held that a statute sanctioning comment was violative of the privilege. *State v. Wolfe,* 64 S.D. 178, 266 N.W. 116 (1936). The New Mexico Court in *Sandoval* found the South Dakota dissents persuasive. In an advisory opinion the Massachusetts Supreme Court, with one dissent, reached the same result as the South Dakota Court. *In re Opinion of the Justices,* 300 Mass. 620, 15 N.E.2d 662 (1938).

B. The Comment And Consideration Sanctioned By The California Constitutional Provision Is Narrow And Goes Only To The Weight Which May Be Afforded To Evidence Presented Against A Defendant Which He Fails To Explain Or Deny By His Testimony.

The comment and consideration sanctioned by the California constitutional provision is narrow and goes simply to the weight which may be afforded to evidence presented in the case against the defendant which he fails to explain or deny by his testimony and the failure of a defendant to testify is not affirmative evidence of any fact. *Adamson v. California, supra,* 55-58; *People v. Adamson,* 27 Cal.2d 478, 488-92, 165 P.2d 3, 8-10 (1946); *People v. Ashley,* 42 Cal. 2d 246, 268-69, 267 P.2d 271, 285 (1954); *People v. Albertson,* 23 Cal.2d 550, 584-86, 145 P.2d 7, 24-25 (1944) (concurring opinion).

The limited scope of permissible consideration is stressed by the instruction given to the jury in this case, a standard formula instruction (CALJIC No. 51, Revised), which provides as follows:

> "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably

drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. *The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.*

"In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such essential element." (CT 57.) (Emphasis added.)

C. A Limited Comment And Consideration Rule Such As The One Sanctioned By California Procedure Operates To The Benefit Of A Defendant In That It Takes A Patent Fact Which The Jury Will Inevitably Consider And Limits Consideration In A Narrow And Logically Appealing Manner.

That an innocent person when confronted by an accusation will tender a denial and protest his innocence is basic fact of human nature which has found expression in our system of law in many ways. Long before any question of the propriety of comment on

a defendant's failure to testify had arisen, the law recognized as part of the admission exception to the hearsay rule, silence or equivocal conduct by a person confronted with an accusation. See generally, 4 Wigmore, Evidence (3d ed. 1940) § 1071, p. 70.

This concept also finds expression in the rule followed in both civil and criminal cases which permits, from the failure of a party or a defendant to produce evidence which it lies within his power to produce, the drawing of an inference that the facts are unfavorable to his cause. *Mammoth Oil Co. v. United States,* 275 U.S. 13, 51-52 (1927); *Local 167 v. United States,* 291 U.S. 293, 298 (1934); *Interstate Circuit v. United States,* 306 U.S. 208, 225-26 (1938); see generally, 2 Wigmore, Evidence (3d ed. 1940) §§ 285-91; 8 Wigmore, Evidence (McNaughton Rev. 1961) § 2273.

Of similar origin is the generally accepted rule of evidence which allows adverse inferences to be drawn when a party to a civil suit fails to testify and controvert evidence which has been presented against him concerning matters presumptively within his knowledge. *Snead v. United States,* 217 F.2d 912, 913-14 (4th Cir. 1954), *cert. denied* 348 U.S. 971 (1955); *United States v. Leveson,* 262 F.2d 659, 661 (5th Cir. 1959); *United States v. De Lucia,* 163 F. Supp. 36, 41 (N.D. Ill. 1957), *aff'd* 256 F2d 487 (7th Cir. 1958), *cert. denied* 358 U.S. 836, *rehearing denied* 358 U.S. 896. See generally, 8 Wigmore, Evidence (McNaughton Rev. 1961) § 2272(1)(e), p. 439.

And, even under the federal no comment rule, a defendant in a criminal case who does take the stand may not stop short in his testimony and omit to explain incriminating circumstances and events in evidence against him without subjecting his silence in that regard to the comments and inferences which become appropriate. *Caminetti v. United States*, 242 U.S. 470, 492-95 (1917).

Recognizing the universal acceptance of the concept that silence in the face of accusation is indicative of guilt, it would be illogical to conclude other than that the fact a defendant fails to testify will be noted by the jury and that the jury will draw certain inferences from that fact. See *United States v. Di Carlo*, 64 F.2d 15, 18 (2d Cir. 1933); *State v. Cleaves*, 59 Me. 298, 8 Am.Rep. 422, 423 (1871); *Parker v. State*, 61 N.J. Law 308, 39 A. 651, 653-54 (1898); *State v. Baker*, 115 Vt. 94, 53 A.2d 53, 59-62 (1947).

Indeed, to find in the Fifth Amendment a rule which would preclude triers of fact from considering so significant a fact would be to demean the Constitution and to place it at odds with common sense. As Justice Frankfurter observed while concurring in the *Adamson* case:

> "Only a technical rule of law would exclude from consideration that which is relevant, as a matter of fair reasoning, to the solution of a problem. Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which

> it is within his power to contradict. The notion that to allow jurors to do that which sensible and right-minded men do every day violates the 'immutable principles of justice' as conceived by a civilized society is to trivialize the importance of 'due process'." 332 U.S. at 60-61.

And, if one accepts the inevitability of the fact that the jury is going to observe and give some consideration to the silence of the defendant, is it not better that the permissible area of consideration be defined for them in a reasonable and fair manner? This, as is apparent from the formula instruction set out earlier, the California procedure does. It takes a patent fact which the jury cannot help but consider and defines in a narrow and logically appealing manner that consideration which the jury may properly give to a defendant's failure to explain or deny evidence produced against him.

D. Assuming Arguendo That Comment Upon A Defendant's Failure To Explain Or Deny By His Testimony Evidence Presented Against Him Is Barred By The Fifth Amendment, Petitioner Has Shown No Prejudice Meriting Reversal.

Should this Court now conclude that comment upon a defendant's failure to explain or deny by his testimony evidence presented against him is barred by the Fifth Amendment privilege against self-incrimination, it cannot be said after a consideration of the record below and the overwhelming evidence of petitioner's guilt that he was prejudiced by the prosecutor's comments or by the court's instruction. See *Coleman v. Denno*, 223 F.Supp. 938, 944-45 (D.C.S.D.

N.Y. 1963), *aff'd* 330 F.2d 441 (2d Cir. 1964), *cert. denied* 377 U.S. 1003. A review of the record in its entirety can leave no doubt that petitioner brutally beat Essie Mae Hodson while attempting to rape her and that she died as a result of the injuries he inflicted upon her.

Petitioner has set out in a footnote in his brief (Pet. Br. 12, fn. 2) the prosecutor's comments concerning the failure of petitioner to testify and to explain or deny certain of the evidence presented against him. This phase of the prosecutor's argument was not particularly extensive, no objection was made to it at trial and it is not now suggested that it exceeded the comment permissible under California procedure. Indeed, the prosecutor told the jury that petitioner's failure to testify supplied no missing link in the prosecution case but that his failure to so testify went only to strengthen otherwise weak links in the prosecution case (RT 605-A64:25-605-A64:9). The jury was not told that they could infer petitioner's guilt from his failure to testify and had this been done, it would have constituted error under California law. *People v. MacCagnan*, 129 Cal.App.2d 100, 113-14, 276 P.2d 679, 688 (1954).

Under the California harmless error rule which is found in Article VI, section 4½ of its Constitution, it has been held that error will not be deemed reversible unless, after an examination of the entire cause including the evidence, the reviewing court is of the opinion it is reasonably probable a result more favorable to the appealing party would have been

reached in the absence of the error. *People v. Watson*, 46 Cal.2d 818, 83[illegible], 299 P.2d 243 (1956); *People v. Parham*, 60 Cal.2d 378, 385-86, 33 Cal.Rptr. 497, 501, 384 P.2d 1001, 1005 (1963). The application of this harmless error rule in evaluating the prejudicial effect of prohibited comment on a defendant's failure to testify in a state criminal trial is quite consistent with due process. *Cf. Fahy v. Connecticut*, 375 U.S. 85, 92-95 (1963) (dissenting opinion). And, the application of this harmless error rule clearly calls for affirmance of the conviction.

II

TESTIMONY CONCERNING THE ASSAULT COMMITTED BY PETITIONER UPON AMANDA ENCINAS IN MEXICO DURING THE INTERIM BETWEEN THE HODSON MURDER AND HIS APPREHENSION WAS PROPERLY ADMISSIBLE DURING THE PENALTY PHASE OF HIS TRIAL AND THE FACT THAT PETITIONER HAD BEEN ACQUITTED OF RAPE BY A MEXICAN COURT DID NOT PRECLUDE ITS USE.

Petitioner's second major contention is that it violated due process of law and denied him equal protection of the law to permit the prosecution during the penalty phase of trial to present evidence concerning the commission of an assault by him in Mexico during the interim between the Hodson murder and his apprehension because it had been judicially determined in Mexico that there was not sufficient evidence to show he had committed the offense.[3] In this regard

[3] At trial defense counsel characterized the disposition as a judgment of dismissal ordered by the court (RT 658-59).

he argues that the Mexican determination was res judicata and binding on the California courts. He also argues that the use of such evidence was basically unfair in that the jury was permitted to base its penalty verdict upon factors other than the offense charged. He further contends that so extending the scope of the penalty phase of trial is basically unfair because the ability of the prosecution to secure and present evidence adverse to a defendant far exceeds the ability of a defendant to secure and present evidence to counter that presented by the prosecution.

A. The Mexican Judicial Determination That Petitioner Had Not Committed The Offense Of Rape Did Not Preclude The Introduction During The Penalty Phase Of Petitioner's Trial Of Testimony Concerning The Facts Of Petitioner's Assault On Amanda Encinas.

Petitioner first argues the Mexican determination was res judicata and precluded the introduction during the penalty phase of his trial of evidence concerning his assault on Amanda Encinas. The question is whether the jury in carrying out its function of fixing the appropriate penalty is to be denied pertinent evidence in that regard because of a failure of proof in an earlier proceeding.[4] The California Supreme Court properly concluded that the evidence was admissible and that when penalty was the issue, rules of res judicata and collateral estoppel could not be invoked to foreclose inquiry into relevant circumstances surrounding the other offense.

---

[4]It seems doubtful that the Mexican court would have dismissed the rape charge had it had the benefit of evidence concerning the attempted rape and the murder of Essie Mae Hodson by petitioner.

In *Williams v. Oklahoma*, 358 U.S. 576 (1959), this Court sanctioned consideration by the sentencing judge in fixing the penalty for a kidnaping conviction, of facts relating to the murder of the kidnap victim, an offense for which the defendant previously had been convicted and sentenced. Although discussed as a double jeopardy issue, implicit in such a holding is a rejection of the argument that res judicata precluded such consideration.

Nor does the fact that petitioner was not convicted of rape in Mexico mean that he did not commit the assault upon Amanda Encinas. As observed by the California Supreme Court, "An acquittal is merely an adjudication that the proof at the prior proceeding was not sufficient to overcome all reasonable doubt of the guilt of the accused." *People v. Griffin*, 60 Cal. 2d 182, 191, 32 Cal.Rptr. 24, 29, 383 P.2d 432, 437 (1963). This Court adopted the same reasoning in *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938), when it permitted imposition of a penalty predicated upon a deficiency in a tax return due to fraud with intent to evade taxation even though the taxpayer had been acquitted of a criminal charge of wilfully attempting to evade the tax.

Consistent with this reasoning, an acquittal of criminal charges has been held not to bar a revocation of parole based on the same factual circumstance (*In re Anderson*, 107 Cal.App.2d 670, 237 P.2d 720 (1951)), nor to bar a proceeding to forfeit a vehicle based upon the same factual circumstance (*People v. One 1950 Pontiac 2-Door Coupe*, 193 Cal.App.2d

216, 218, 13 Cal.Rptr. 916, 917 (1961); *People v. One 1950 Cadillac Club Coupe*, 133 Cal.App.2d 311, 313-20, 284 P.2d 1 [illegible], 120-24 (1955)), nor to bar a proceeding to revoke a professional license based upon the same factual circumstance (*Traxler v. Board of Medical Examiners*, 135 Cal.App. 37, 39-40, 26 P.2d 710, 711-12 (1933); *Bold v. Board of Medical Examiners*, 135 Cal.App. 29, 33-34, 26 P.2d 707, 708-09 (1933)).

To the same effect, when evidence concerning another offense is otherwise admissible on the issue of guilt as going to show a common plan, scheme, or design, the fact that the defendant may have been acquitted of the prior offense (*People v. Frank*, 28 Cal. 507, 515-18 (1865); *People v. Massey*, 196 Cal.App.2d 230, 234-35, 16 Cal.Rptr. 402, 405 (1961); *People v. Lachuk*, 5 Cal.App.2d 729, 731-32, 43 P.2d 579, 580-81 (1935)), or that charges relating to the prior offense were dismissed (*People v. Fox*, 126 Cal.App.2d 560, 569, 272 P.2d 832 (1954); *People v. Raleigh*, 83 Cal.App.2d 435, 442-43, 189 P.2d 79, 74 (1948)) does not preclude its use in evidence.

B. If The Modern Philosophy Of Penology That Punishment Should Fit The Offender And Not Merely The Crime Is To Be Effectively Implemented, A Sentencing Body Must Be Afforded Wide Latitude As To The Type Of Information Concerning The Background And History Of An Offender And Of Matters In Aggravation Or Mitigation Of Punishment Which It May Properly Consider.

Petitioner also attacks the constitutionality of the provisions in section 190.1 of the California Penal Code to the effect that during the proceeding on pen-

alty, evidence may be presented "of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty," He argues that to permit the jury to consider collateral matters in addition to the circumstances of the crime for which he is to be punished violates due process in that the jury may base its verdict "not upon the crime charged but upon the personality of the defendant and on other alleged crimes or acts not charged in any indictment or information." (Pet. Br. 17).

Consistent with the current philosophy of penology that punishment should fit the offender as well as the crime, this Court has recognized the significance of evidence concerning the individual, his history and background to the imposition of an appropriate sentence. *Williams v. New York,* 337 U.S. 241 (1949); *Williams v. Oklahoma, supra.* In a capital case which placed in issue the propriety of consideration by the sentencing judge of information acquired from probation reports and out of court sources, this Court said in *Williams v. New York, supra,* at page 247:

> "Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. [footnote omitted] And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."

Logic would indicate that a jury in performing the same function of sentencing should have the benefit of information concerning the same factors. *Ward v. California,* 269 F.2d 906, 908 (9th Cir. 1959). California, while extending a wide latitude as to the factors which a jury may consider on the issue of penalty imposes evidentiary standards as to the manner of proof which are as stringent as those governing trial on the issue of guilt.

California does not permit the introduction of irrelevant evidence, that is evidence of such a nature that its prejudicial effect to the defendant outweighs its probative value. See *e.g. People v. Love,* 53 Cal. 2d 843, 856-57, 3 Cal.Rptr. 665, 672-73, 350 P.2d 705, 712-13 (1960); *People v. Hamilton,* 60 Cal.2d 105, 131-32, 32 Cal.Rptr. 4, 19-20, 383 P.2d 412, 427-28 (1963). California also limits the manner in which pertinent factors may be proved by requiring the exclusion of incompetent evidence. See *e.g. People v. Hamilton, supra,* 129-31, 32 Cal.Rptr. at 18-19, 383 P.2d at 426-27; *People v. Purvis,* 52 Cal.2d 871, 883-84, 346 P.2d 22 (1959).

Petitioner also argues that affording such wide latitude as to matters which may be presented on the issue of penalty is basically unfair since the "power of the prosecution to bring in evidence adverse to a defendant is much greater than the power of a defendant to obtain evidence that would help him or that would controvert the prosecution's evidence" (Pet. Br. 18). In this regard he refers to the reports and records retained by law enforcement, the reluct-

ance of witnesses to travel to another jurisdiction to testify for fear they will incur the possible ill will of local police officials, and the more favorable financial position enjoyed by the prosecution.

Just what significance these arguments have to the instant case is difficult to discern. The principal evidence presented during the penalty trial by the prosecution related to petitioner's assault upon Amanda Encinas in Mexico, an offense which occurred under circumstances remarkably similar to the Hodson murder. Proof by the prosecution was tendered not by police reports or records but by witnesses to the offense. The only use of records in this regard was by the defense which introduced the record of the Mexican court's disposition (RT 930-31). Although no witnesses to the event were presented by the defense other than petitioner himself, there is no suggestion in the record that this was because any potential witnesses were in fear of incurring the ill will of local law enforcement personnel.

Nor, does petitioner's statement that he, as an indigent defendant, was unable financially to bring witnesses from Mexico (Pet. Br. 19) find any support in the record. Indeed, the record does indicate that the public defender's office had sent two investigators down to Mexico (RT 610), and it further indicates that the trial judge expressed a willingness to pay the expenses of defense witnesses called in rebuttal to evidence presented by the prosecution concerning the Mexican assault (RT 654). Also, it should be noted that petitioner's brother, Willie Warren, appeared as

a defense witness (RT 945 et seq.), presumably from Michigan with expenses paid by the Court (see RT 651-52).

It is unreasonable to suggest that a sentencing body should be denied relevant and pertinent information simply because ordinarily the prosecution is more able financially to secure and present evidence. The important consideration is not that the defense and prosecution be equally situated from a standpoint of the resources available to them, but rather that the sentencing body have available to it the competent and relevant evidence it needs to assist it in making an intelligent determination.

III

UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE THE CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE PRESENTS NO FEDERAL QUESTION.

Although petitioner lists a challenge to the sufficiency of the evidence as one of the questions he presents (Pet. Br. 9), it seems apparent from his brief that he makes no serious challenge to the conviction in this regard.

Although a conviction which is devoid of evidentiary support does not comport with due process of law (*Thompson v. Louisville*, 362 U.S. 199 (1960)), it is manifest that this case poses no such problem. The facts and circumstances as reflected in the record are not only sufficient to support the conviction, they compel the conclusion of guilt.

CONCLUSION

For the foregoing reasons, respondent respectfully urges that the judgment of conviction and sentence in petitioner's case be affirmed.

Dated, San Francisco, California,
November 18, 1964.

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ALBERT W. HARRIS, JR.,
Deputy Attorney General of the State of California,
DERALD E. GRANBERG,
Deputy Attorney General of the State of California,
Of Counsel.

(Appendix A Follows)

Appendix A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article I, Section 13, California Constitution:

"In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court and to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have

power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide w[illegible] there is reason to believe that the witness, from inability or other cause, will not attend at the trial."

Section 190.1, Penal Code of California:

"The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be

the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges the jury in which case a new jury shall be drawn to determine the issue of penalty.

In any case in which the defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial of the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury."

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[redacted] Petitioner,

vs.

[redacted] Respondent.

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OCTOBER TERM, 1964

No. 202

EDDIE DEAN GRIFFIN,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

ANSWER TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent State of California relies on the overruled cases of *Twining* v. *New Jersey*, 211 US 277, and *Adamson* v. *California*, 332 US 46.

Those cases have already been squarely overruled by *Malloy* v. *Hogan*, 378 US 1 (1964). While *Malloy* v. *Hogan* involved another State, we believe the answer in that case was clear that the provisions of the Fifth Amendment against compulsory self-incrimination is protected by the Fourteenth Amendment and Article I, Section 13 of the Constitution of California, which was re-enacted by statute in Section 1323 of the Penal Code of California, was and is in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

In his admirable dissent in *Adamson* v. *California* in 332 US at 69, Mr. Justice Black said:

> "The Twining case was the first, as it is the only, decision of this Court in which is squarely held that states were free notwithstanding the Fifth and Fourteenth Amendments to extort evidence from one accused of crime."

The learned analysis of the *Twining* case and the provisions of the Fifth and Fourteenth Amendments is clearly set forth in that dissenting opinion by Mr. Justice Black and is a complete answer to the argument now presented.

Adamson was a California case involving similar issues to *Griffin*, but *Adamson* was wrongly decided and should now be squarely overruled as it was in *Malloy* v. *Hogan*, *supra*.

As Mr. Justice Black says in *Adamson* v. *California*, 332 US at 89:

> "I cannot consider the Bill of Rights to be an outworn 18th Century 'straitjacket' as the Twining opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils but they are the same kind of human evils that emerge from century to century where excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as the Bill of Rights like ours and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old as well as new devices and practices which thwart those purposes . . . I would follow what I believe was the original purpose of the Fourteenth Amendment, to extend to all the people of the nation the complete protection of the Bill of Rights."

To permit comment on the failure of a defendant to testify is to force and extort testimony from him and abuse the very privilege which the Constitution and statutes give to him as a sword to convict him. No other consequences can follow.

Mr. Justice Murphy, in his dissent in *Adamson* v. *California*, joined in by Mr. Justice Black, says (332 US 124, 91 L.ed. 1946):

> "That point, however, need not be pursued here inasmuch as the Fifth Amendment is explicit in its provision that no person shall be compelled in any criminal case to be a witness against himself. That provision, as Mr. Justice Black demonstrates, is a constituent part of the Fourteenth Amendment.
>
> "Moreover, it is my belief that this guarantee against self-incrimination has been violated in this case. Under California law the judge or prosecutor may comment on the failure of a defendant in a criminal trial to explain or deny any evidence or fact introduced against him. As interpreted and applied in this case, such a provision compels a defendant to be a witness against himself in one of two ways:
>
> "1. If he does not take the stand his silence is used as a basis for drawing unfavorable inferences against him as to matters which he might reasonably be expected to explain. Thus he is compelled, through his silence, to testify against himself and silence can be as effective in this situation as oral statements.
>
> "2. If he does take the stand, thereby opening himself to cross-examination, so as to overcome the effects of the provision in question, he is necessarily compelled to testify against himself. In that case his testimony on cross-examination is the result of

> coercive pressure of the provision rather than his own volition. . . .
>
> "This guarantee of freedom from self-incrimination is grounded on a deep respect for those who might prefer to remain silent before their accusers. To borrow the language from Wilson v. United States, 149 US 60, 66, 37 L.ed. 650, 651, 13 S.Ct. 765, 'It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not everyone, however honest, who would, therefore, willingly be placed on the witness stand.'
>
> "We are glad to give effect to the principle of freedom from self-incrimination. That principle is as applicable where the compelled testimony is in the form of silence as where it is composed of oral statements."

The discussion by the respondent that the California constitutional provision "is narrow and goes only to the weight which may be afforded to evidence presented in the case against the defendant, which he fails to explain or deny by his testimony", is an admission that the provision itself is a bad provision and that an attempt to evade a constitutional mandate of our country against self-incrimination has been limited to the narrow scope. However narrow it may be, it is still in violation of those fundamental principles of justice and fair play which inhere in our country's proceedings against self-incrimination.

The third argument of the respondent that a limited comment "operates to the benefit of a defendant" avoids the

proposition that this benefit, if it is possible in any case, is one which the defendant himself may choose or reject under the provisions of the Fifth and Fourteenth Amendments. Of course, a defendant who feels that he may be benefited under any situation can waive a constitutional right and guarantee but that choice is to him and not as to the State which compels him to choose, under any circumstances.

The fourth argument made by the respondent is that even though the comment is barred by the Fifth Amendment, "petitioner has shown no prejudice meriting reversal."

This is a surprising argument coming from the People of the State of California since this Court has repeatedly held that where rights under the Constitution of the United States have been violated, the question of prejudice or no prejudice is not one in which this Court determines that constitutional issue.

Chambers v. *Florida*, 309 US 227, 84 L.ed. 716;
Lisenba v. *California*, 314 US 219, 86 L.ed. 166;
Mooney v. *Holohan*, 294 US 103;
Tot v. *United States*, 219 US 463, 467;
Bram v. *United States*, 168 US 532, 42 L.ed. 568.

Furthermore, this Court in *Faye* v. *Connecticut*, 375 US 85, 11 L.ed. 2d 191, rejected the harmless error rule which has been urged by the People.

This Court has held in the confession cases, and even a majority has said, that in a confession case "It may well be that a confession is never to be considered as non-prejudicial." To paraphrase this argument we may say that evidence which is extorted or compelled on the witness stand is tantamount to confession and is not to be considered as non-prejudicial.

In *Lisenba* v. *California*, 314 US 219, 237, this Court itself commented on the fact that if evidence would be extorted in open court it would be in violation of due process. What could be more an extortion of evidence in open court than Article I, Section 13 of the Constitution of California and its parallel Penal Code sections which carry out its provisions. The opinion of Mr. Justice Murphy, concurred in by Mr. Justice Black in *Adamson* v. *California*, clearly demonstrates this point.

The admission of evidence concerning the alleged assault in Mexico on which the defendant was there acquitted was in violation of general principles of full faith and credit given to judgments of other states and other countries.

California itself has a statute which provides as follows:

> "Section 656, Penal Code. Acquittal or Conviction Under Foreign Law.
>
> "Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another state, government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense."

See also:

> 7 Cal.Jur. 958;
> 16 Corpus Juris 239, 258, 282;
> 8 RCL 136;
> West's WSCL Crimes, Sec. 48.

Mexico is a favored nation under treaty and the acts of its courts are entitled to full faith and credit in the United States the same as the State of California.

In *Hughes* v. *Fetter*, 341 US 609, 95 L.ed. 1212, Mr. Justice Black, writing for the Court, said that local policy must yield to the constitutional requirements that full faith and credit must be given in each state to the public acts of any other state. Under the equal protection clause, we believe that the same must apply to foreign decisions and foreign judgments in other countries. The vice of the California procedure in this case was that it nullified full faith and credit to the acts of the Mexican court. In addition, it is fundamentally unfair and not in accordance with standards of American justice.

We believe that the full faith and credit clause of Article IV, Section 1 of the Constitution of the United States, must be extended to Mexico.

Furthermore, we believe that in permitting the evidence in the California court also violated due process of law under the Fourteenth Amendment to the Constitution of the United States since it failed to follow its own provisions of its own Penal Code section commanding that this be done, Section 656, Penal Code of the State of California,

Section 668 of the Penal Code of California requires California to recognize judgments in other countries for consideration as to whether they constitute a prior conviction of a felony. The same effect should be given to an acquittal, therefore, as would be given to a conviction. See Section 668 of the Penal Code of the State of California.

The attempt by the State of California to divide the case into a philosophy of penology becomes irrelevant if the constitutional provisions of full faith and credit and due process were violated. Furthermore, there can be but one judgment in a case and one ultimate decision and this must be the result of fundamental fairness in the treatment of

the accused. The treatment accorded here was fundamentally unfair.

We respectfully submit that under the evidence here, the evidence is entirely devoid of evidentiary support to sustain the judgment.

We therefore pray for reversal of the judgment below and an order dismissing the indictment.

Respectfully submitted,

MORRIS LAVINE
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1964

No. 202

EDDIE DEAN GRIFFIN,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of California

PETITION FOR REHEARING

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EDDIE DEAN GRIFFIN, *Petitioner,*

vs.

STATE OF CALIFORNIA, *Respondent.*

On Writ of Certiorari to the Supreme Court of California

PETITION FOR REHEARING

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

The respondent, the People of the State of California, respectfully petitions under Rule 58 for a rehearing by this Honorable Court of the above-entitled cause.

PRELIMINARY STATEMENT

Respondent respectfully urges this Court in considering this Petition for rehearing to consider the fact that in *United States v. Gainey*, 380 U.S. 63 (1965), it upheld a federal statutory presumption which authorizes a jury to convict a defendant for operating an illegal distillery solely on the basis of his presence at the site of an illegal still unless he explains his presence to the jury's satisfaction. In the case at bar, however, this Court holds unconstitutional a state rule which creates no presumption of guilt, nor warrants any inference of guilt, nor relieves the prosecution of any of its burden of proof, but which simply sanctions comment upon the manner in which the jury may evaluate prosecution evidence which a defendant has not explained or denied whether or not he has testified.

We submit that these two decisions are irreconcilable and that the validity of the holding in *Gainey* points up the invalidity of this Court's decision in this case. In the circumstances presented by either case, the defendant is left free to decide whether or not he will testify and any compulsion to testify which he may feel simply arises from the accusatory nature of the trial itself. *Yee Hem v. United States*, 268 U.S. 178, 185 (1924); *State v. Garvin*, 44 N.J. 268, 208 A.2d 402, 408 (1965).

ARGUMENT

I

CALIFORNIA'S LIMITED COMMENT RULE DOES NOT VIOLATE THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION.

By holding that the Fifth Amendment precludes reasonable comment upon the failure of an accused to explain or deny prosecution evidence presented against him during his criminal trial, this Court has elevated a legislative policy determination to the status of a constitutional mandate. Certainly nothing in the history of the privilege against compulsory self-incrimination suggests a preclusion against such comment. Bruce, *The Right to Comment on the Failure of the Defendant to Testify*, 31 Mich. L. Rev. 226, 233 (1932); 8 Wigmore, Evidence (McNaughton Rev. 1961), §§ 2250-2252; McCormick, Evidence pp. 279-280; *State v. Baker*, 115 Vt. 94; 53 A.2d 53, 57-60 (1947).

Indeed, the federal no comment rule, as first articulated by this Court, was predicated upon a statute enacted nearly 100 years after the adoption of the Fifth Amendment; a statute which for the first time made defendants in federal criminal cases competent to testify if they elected to do so but which also provided that a decision not to testify was to create no presumption against them. *Wilson v. United States*, 149 U.S. 60 (1893). That construction of the statute itself has been criticized as unduly indulgent to criminal defendants (Bruce, *The Right to Comment on the Failure of the Defendant to Testify*, 31 Mich. L. Rev. 226, 230 [1932]), but in any event this Court

was functioning there in its supervisory role over the federal courts.

It is apparent that this Court's holding invalidating the California comment rule is based upon two salient considerations. One is the finding that the comment rule is "in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify." The other is the characterization of the comment rule as a rule permitting the imposition of a penalty for exercising a constitutional privilege in that it "cuts down on the privilege by making its assertion costly." We submit that these reasons neither individually nor together compel the holding that California's limited comment rule offends the privilege against compulsory self-incrimination.

In *Yee Hem v. United States*, 268 U.S. 178 (1924), an attack was made upon a federal statutory presumption which authorized a jury to convict a person for the possession of unlawfully imported smoking opium solely on the basis of possession of smoking opium unless the defendant explained its possession to the satisfaction of the jury. In disposing of the contention that the statutory presumption conflicted with the constitutional privilege against compulsory self-incrimination, this Court said as follows:

> "The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The stat-

ute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution." 268 U.S. at 185.

In *United States v. Gainey*, 380 U.S. 63 (1965), this Court recently upheld a similar federal statutory presumption which permitted a jury to convict a defendant for carrying on the business of operating an illegal distillery solely on the basis of his presence at the site of the still unless he explained his presence to the satisfaction of the jury.

We submit that if the federal government, without violating the privilege against compulsory self-incrimination, can enact a statutory presumption authorizing conviction solely upon the basis of presence at the site of a crime unless that presence is explained to the satisfaction of the jury, certainly a state can

sanction limited comment upon the manner in which a jury may evaluate prosecution evidence which a defendant has not explained or denied. Any compulsion to testify inherent in the limited comment permitted by the California rule exists even more strongly in the federal statutory presumption upheld by this Court in *Gainey*.

We find the position of Mr. Justice Stewart and Mr. Justice White, both with the majority in *Gainey*, and dissenting in this case, quite consistent. Similarly we find the position of Mr. Justice Black and Mr. Justice Douglas, both dissenting in *Gainey* and with the majority in this case, quite consistent. However, we are at a loss to understand what influences the balance of this Court to invalidate California's limited comment rule while upholding the federal statutory presumption at issue in *Gainey*.

Certainly, if California's limited comment rule is unconstitutional because it "is in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify," the federal statutory presumption at issue in *Gainey* is unconstitutional for the same reason. As Mr. Justice Black observed, dissenting in *Gainey*:

> "These statutory presumptions must tend, when incorporated into an instruction, as they were here, to influence the jury to reach an inference which the trier of fact might not otherwise have thought justified, to push some jurors to convict who might not otherwise have done so." 380 U.S. at 87.

And certainly, if California's limited comment rule is unconstitutional because it is a penalty imposed for exercising a constitutional privilege by cutting "down on the privilege by making its assertion costly," the same infirmity exists as to the federal statutory presumption upheld by this Court in *Gainey*. As Mr. Justice Black observed, dissenting in *Gainey*:

> "The undoubted practical effect of letting guilt rest on unexplained presence alone is to force a defendant to come forward and testify, however much he may think doing so may jeopardize his chances of acquittal, since if he does not he almost certainly destroys those chances. This is compulsion, which I think runs counter to the Fifth Amendment's purpose to forbid convictions on compelled testimony." 380 U.S. at 87.

Realistically, it is neither the statutory presumption nor the comment rule which creates the compulsion to testify, but rather the coercive nature of the criminal trial itself. While the Constitution does afford to a defendant the right to remain silent, it cannot shield him from the evidence against him or the compulsion which it generates. As the New Jersey Supreme Court in *State v. Garvin*, 44 N.J. 268, 208 A.2d 402 (1965), observed:

> "When the State's case points an accusing finger directly at a defendant, common sense demands that he testify if in truth he is able to fend off the evidence against him. Neither the absence of comment nor an instruction against an adverse inference can dilute the inculpatory force of uncontradicted evidence of that character. This

> is the situation which confronted defendant in the case at hand. It would be sheer speculation to say that but for Corby he likely would have permitted the pointed testimony against him to go undenied. The great probability is that the testimony was the coercive force he could not resist." 208 A.2d at 408.

Finally, we submit that this Court should bear in mind that it is one thing to construe a federal statute which is enacted to regulate the practices of prosecutors and judges in the handling of criminal cases in the federal system. Reasonable men may differ as to the proper construction to be given the federal statute in question and the proper manner in which a criminal trial should be conducted to insure fairness and yet maintain the administration of justice.

It is another thing entirely to read into the Constitution of the United States a rigid and inflexible rule which will not only regulate procedure in the state courts but retroactively will upset hundreds if not thousands of final judgments of conviction. There are countless state prisoners who failed to testify in state trials and who stand convicted of serious criminal offenses. Every prisoner in this position can now claim that he has been denied his federal constitutional rights. Moreover, it is common knowledge that many of these prisoners are criminal offenders with a long series of prior felony convictions.

There are those who do not deem the large scale release of convicted criminals to be a significant consideration. And this may be true when there has

been a denial of fundamental fairness in the criminal proceedings. However, the practice in question here was overwhelmingly adopted by the People of California and made a part of its Constitution in 1933. Thereafter prosecutors and judges in California followed this constitutional directive as indeed they were bound to do by their oaths. Moreover, the comment rule was given the stamp of approval by the highest court in California and by this Court.

Now every conviction secured during those 32 years in which a defendant failed to take the stand may be subject to collateral attack. All this, not for any denial of fundamental fairness, nor even for any error, but because a majority of the members of this Court have concluded that there is a slight and almost imperceptible lack of symmetry between federal and California procedure.

We submit that the confidence of the bench, the bar and the people in our system of justice cannot survive under these conditions. Particularly is this so when it appears that different and more stringent Fifth Amendment standards are applicable to the states than to the federal government. Even more disquieting is the reliance by the majority of this Court upon the slogan that the comment rule is "a remnant of the 'inquisitorial system of criminal justice'"—a statement which is both historically inaccurate and logically baffling. Finally, we are alarmed when a majority of this Court confuses the historic role of the Fifth Amendment with procedural rules reflecting concern over the confidence of witnesses.

The Fifth Amendment was never enacted, nor has it been interpreted, as a device to shore up the excessively timid and nervous criminal defendant. It was enacted to protect against and prevent the use of compelled testimony and statements.

II

SHOULD THIS COURT STAND BY ITS HOLDING THAT CALIFORNIA'S LIMITED COMMENT RULE VIOLATES THE PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION, THIS JUDGMENT SHOULD NOT BE SUMMARILY REVERSED BUT THE CASE SHOULD BE REMANDED TO THE CALIFORNIA SUPREME COURT FOR AN EVALUATION OF THE PREJUDICIAL EFFECT OF THE COMMENT.

In the past this Court has made it clear that when comment upon a defendant's failure to testify occurs in a federal trial, such error is not reversible per se. For example, in *Wilson v. United States*, 149 U.S. 60 (1893), this Court said at page 70:

> "We do not see how this statute can be completely enforced, unless it be adopted as a rule of practice that such improper and forbidden reference by counsel for the prosecution shall be regarded good ground for a new trial *in all cases where the proofs of guilt are not so clear and conclusive that the court can say affirmatively the accused could not have been harmed from that cause.*" (Emphasis added.)

Similarly in *Johnson v. United States*, 318 U.S. 189 (1943), although finding error in comment on the defendant's reliance on the privilege, this Court declined to reverse, finding that the error had been

waived, an implicit holding that the error was not reversible per se. Lower federal courts have also declined to reverse cases because of comment on reliance on the privilege when under the circumstances the error was not deemed of significant prejudicial effect to merit reversal. See *e.g., Coleman v. Denno*, 223 F.Supp. 938 (D.C.S.D. N.Y. 1963), *affirmed, United States v. Denno*, 330 F.2d 441 (2d Cir. 1964), *certiorari denied* 337 U.S. 1003; *United States v. Di Carlo*, 64 F.2d 15 (2d Cir. 1933).

There are two factors in this case which are of key significance in evaluating the possible prejudicial effect flowing from the comment. One is that the comment goes to a patent fact which the jury cannot fail to observe, namely, the failure of the defendant to contradict or deny evidence presented against him. The second is the extremely limited scope of permissible comment sanctioned by the California rule which goes only to the manner in which the jury may evaluate prosecution evidence which the defendant has not explained or denied.

We cannot overemphasize the importance of the need for a holding that error in a state court in the form of comment upon a defendant's failure to testify is not reversible per se. Absent such a holding, we are virtually precluded from defending against collateral attacks upon convictions in which such comment has in fact occurred. For obvious reasons such comment will frequently be found in cases involving the trial of previously convicted felons who decline to take the stand for fear of impeachment as such. Thus, many

of the cases which will be susceptible to collateral attack on this basis will involve defendants under long-term sentences whose convictions have occurred so far in the past that retrial will be impossible because evidence and witnesses are no longer available. The net result will be that some of the most vicious and hardened members of our criminal element will be released to once more prey upon our populace.

We further submit that not only is an evaluation of the prejudicial effect flowing from such comment appropriate, but that this is a determination which should be made in the first instance in the state court. California has a harmless error rule set forth in Article VI, section 4½ of its Constitution, which has been construed to preclude reversal of a conviction for error unless an examination of the entire cause, including the evidence, convinces the reviewing court that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of such error. *People v. Watson,* 46 Cal.2d 818, 299 P.2d 243 (1956); *People v. Parham,* 60 Cal.2d 378, 384 P.2d 1001 (1963). We submit that the application of this harmless error rule in evaluating the prejudicial effect of comment on the defendant's failure to testify in a state trial is perfectly consistent with due process.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that a rehearing be granted in this case so

that the holding in this case may be squared with this Court's decision in *Gainey* and so that the various states may be afforded the same latitude under the Fifth Amendment that *Gainey* affords to the federal government.

Dated, San Francisco, California,
May 19, 1965.

THOMAS C. LYNCH,
Attorney General of the State of California,
ARLO E. SMITH,
Chief Assistant Attorney General of the State of California,
ALBERT W. HARRIS, JR.,
Deputy Attorney General of the State of California,
DERALD E. GRANBERG,
Deputy Attorney General of the State of California,
Attorneys for Respondent.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for respondent in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
May 19, 1965.

DERALD E. GRANBERG,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

No. 202.—October Term, 1964.

Eddie Dean Griffin, Petitioner, v. State of California. | On Writ of Certiorari to the Supreme Court of the State of California.

[April 28, 1965.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner was convicted of murder in the first degree after a jury trial in the California court. He did not testify at the trial on the issue of guilt, though he did testify at the separate trial [1] on the issue of penalty. The trial court intructed the jury on the issue of guilt, stating that a defendant has a constitutional right not to testify. But it told the jury: [2]

> "As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."

It added, however, that no such inference could be drawn as to evidence respecting which he had no knowl-

[1] See Penal Code, § 190.1, providing for separate trials on the two issues.

[2] Article I, § 13, of the California Constitution provides in part:

"... in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

edge. It stated that failure of a defendant to deny or explain the evidence of which he had knowledge does not create a presumption of guilt nor by itself warrant an inference of guilt nor relieve the prosecution of any of its burden of proof.

Petitioner had been seen with the deceased the evening of her death, the evidence placing him with her in the alley where her body was found. The prosecutor made much of the failure of petitioner to testify:

"The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her.

"What kind of a man is it that would want to have sex with a woman that beat up if she was beat up at the time he left?

"He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.

"These things he has not seen fit to take the stand and deny or explain.

"And in the whole world, if anybody would know, this defendant would know.

"Essie Mae is dead, she can't tell you her side of the story. The defendant won't."

The death penalty was imposed and the California Supreme Court affirmed. 60 Cal. 2d 182. The case is here on a petition for a writ of certiorari which we granted. 377 U. S. 989, to consider the single question

whether comment on the failure to testify violated the Self-Incrimination Clause of the Fifth Amendment which we made applicable to the States by the Fourteenth in *Malloy* v. *Hogan*, 378 U. S. 1, decided after the Supreme Court of California had affirmed the present conviction.[3]

If this were a federal trial, reversible error would have been committed. *Wilson* v. *United States*, 149 U. S. 60 so holds. It is said, however, that the *Wilson* decision rested not on the Fifth Amendment, but on an Act of Congress, namely, 18 U. S. C. § 3481.[4] That indeed is the fact,

[3] The California Supreme Court later held in *People* v. *Modesto*, 62 A. C. 452, that its "comment" rule squared with *Malloy* v. *Hogan*, 378 U. S. 1. The overwhelming consensus of the States, however, is opposed to allowing comment on the defendant's failure to testify. The legislatures or courts of 44 States have recognized that such comment is, in light of the privilege against self-incrimination, "an unwarrantable line of argument." *State* v. *Howard*, 35 S. C. 197, 14 S. E. 481, 483. See 8 Wigmore, Evidence (McNaughton rev. ed. 1961 and 1964 Supp.), § 2272, n. 1. Of the six States which permit comment, two, California and Ohio, give this permission by means of an explicit constitutional qualification of the privilege against self-incrimination. Cal. Const., Art. I, § 13; Ohio Const., Art. I, § 10. New Jersey permits comment, *State* v. *Corby*, 28 N. J. 106, 145 A. 2d 289; cf. *State* v. *Garvin*, — N. J. — (Mar. 22, 1965); but its constitution contains no provision embodying the privilege against self-incrimination (see *Laba* v. *Newark Bd. of Educ.*, 23 N. J. 364, 389, 129 A. 2d 273, 287; *State* v. *White*, 27 N. J. 158, 168–169, 142 A. 2d 65, 70). The absence of an express constitutional privilege against self-incrimination also puts Iowa among the six. See *State* v. *Ferguson*, 226 Iowa 361, 372–373, 283 N. W. 917, 923. Connecticut permits comment by the judge but not by the prosecutor. *State* v. *Heno*, 119 Conn. 29, 174 A. 181. New Mexico permits comment by the prosecutor but holds that the accused is then entitled to an instruction that "the jury shall indulge no presumption against the accused because of his failure to testify." N. M. Stat. Ann. § 41–12–19; *State* v. *Sandoval*, 59 N. M. 85, 279 P. 2d 850.

[4] Section 3481 reads as follows:

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory,

as the opinion of the Court in the *Wilson* case states. And see *Adamson* v. *California*, 332 U. S. 46, 50, n. 6; *Bruno* v. *United States*, 308 U. S. 287, 294. But that is the beginning, not the end of our inquiry. The question remains whether, statute or not, the comment rule, approved by California, violates the Fifth Amendment.

We think it does. It is in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations; but the prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance. The Court in the *Wilson* case stated:

"... the Act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who

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the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him. June 25, 1948, c. 645, 62 Stat. 833."

The legislative history shows that 18 U. S. C. § 3841 was designed, *inter alia*, to bar counsel for the prosecution from commenting on the defendant's refusal to testify. Mr. Frye of Maine, spokesman for the Bill, said, "That is the law of Massachusetts, and we propose to adopt it as a law of the United States." 7 Cong. Rec., Pt. I, p. 385. The reference was to Mass. Stat. 1866, c. 260, now Mass. Gen. Laws Ann., c. 233, § 20, cl. Third (1959), which is almost identical with 18 U. S. C. § 3481. See also *Commonwealth* v. *Harlow*, 110 Mass. 411; *Commonwealth* v. *Scott*, 123 Mass. 239; *Opinion of the Justices*, 300 Mass. 620, 15 N. E. 2d 662.

would, therefore, willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him." 149 U. S., p. 96.

If the words "Fifth Amendment" are substituted for "Act" and for "statute," the spirit of the Self-Incrimination Clause is reflected. For comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55, which the Fifth Amendment outlaws.[5] It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within

[5] Our decision today that the Fifth Amendment prohibits comment on the defendant's silence is no innovation, for on a previous occasion a majority of this Court indicated their acceptance of this proposition. In *Adamson* v. *California*, 332 U. S. 46, the question was, as here, whether the Fifth Amendment proscribed California's comment practice. The four dissenters (BLACK, DOUGLAS, Murphy and Rutledge, JJ.) would have answered this question in the affirmative. A fifth member of the Court, Justice Frankfurter, stated in a separate opinion: "For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions." *Id.*, at 61. But, though he agreed with the dissenters on this point, he also agreed with Justices Vinson, Reed, Jackson, and Burton that the Fourteenth Amendment did not make the Self-Incrimination Clause of the Fifth Amendment applicable to the States; thus he joined the opinion of the Court which so held (the Court's opinion assumed that the Fifth Amendment barred comment, but it expressly disclaimed any intention to decide the point. *Id.*, at 50).

the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. *People* v. *Modesto*, 62 A. C. 452, 468–469. What the jury may infer given no help from the court is one thing. What they may infer when the court solemnizes the silence of the accused into evidence against him is quite another. That the inference of guilt is not always so natural or irresistible is brought out in the *Modesto* opinion itself:

"Defendant contends that the reason a defendant refuses to testify is that his prior convictions will be introduced in evidence to impeach him ([Cal.] Code Civ. Proc., § 2051) and not that he is unable to deny the accusations. It is true that the defendant might fear that his prior convictions will prejudice the jury, and therefore another possible inference can be drawn from his refusal to take the stand." *Id.*, at 469.

We said in *Malloy* v. *Hogan*, *supra*, p. 11, that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the federal government, and, in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.[6]

Reversed.

THE CHIEF JUSTICE took no part in the decision of this case.

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[6] We reserve decision on whether an accused can require, as in *Bruno* v. *United States*, 308 U. S. 287, that the jury be instructed that his silence must be disregarded.

SUPREME COURT OF THE UNITED STATES

No. 202.—October Term, 1964.

Eddie Dean Griffin, Petitioner, v. State of California.	On Writ of Certiorari to the Supreme Court of the State of California.

[April 28, 1965.]

Mr. Justice Harlan, concurring.

I agree with the Court that within the federal judicial system the Fifth Amendment bars adverse comment by federal prosecutors and judges on a defendant's failure to take the stand in a criminal trial, a right accorded him by that amendment. And given last Term's decision in *Malloy* v. *Hogan*, 378 U. S. 1, that the Fifth Amendment applies to the States in all its refinements, I see no legitimate escape from today's decision and therefore concur in it. I do so, however, with great reluctance, since for me the decision exemplifies the creeping paralysis with which this Court's recent adoption of the "incorporation" doctrine is infecting the operation of the federal system. See my concurring opinion in *Pointer* v. *Texas*, — U. S. —, at —.

While I would agree that the accusatorial rather than inquisitorial process is a fundamental part of the "liberty" guaranteed by the Fourteenth Amendment, my Brother Stewart in dissent, *post*, p. —, fully demonstrates that the no-comment rule "might be lost, and justice still be done," *Palko* v. *Connecticut*, 302 U. S. 319, 325. As a "non-fundamental" part of the Fifth Amendment (cf. *Pointer*, at —), I would not, but for *Malloy*, apply the no-comment rule to the States.

Malloy put forward a single argument for applying the Fifth Amendment, *as such*, to the States:

"It would be *incongruous* to have different standards determine the validity of a claim of privilege . . . ,

depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or a state proceeding is justified." *Malloy* v. *Hogan*, *supra*, at 11. (Emphasis added.)

My answer then (378 U. S., at 27) and now is that "incongruity," within the limits of fundamental fairness, is at the heart of our federal system. The powers and responsibilities of the State and Federal Governments are not congruent, and under the Constitution they are not intended to be.

It has also recently been suggested that measuring state procedures against standards of fundamental fairness as reflected in such landmark decisions as *Twining* v. *New Jersey*, 211 U. S. 78, and *Palko* v. *Connecticut*, *supra*, "would require this Court to intervene in the state judicial process with considerable lack of predictability and with a consequent likelihood of considerable friction," *Pointer* v. *Texas*, 380 U. S. —, — (concurring opinion of GOLDBERG, J.). This approach to the requirements of federalism, not unlike that evinced by the Court in *Henry* v. *Mississippi*, 379 U. S. 443, apparently leads, in cases like this, to the conclusion that the way to eliminate friction with state judicial systems is not to attempt a working harmony, but to override them altogether.

Although compelled to concur in this decision, I am free to express the hope that the Court will eventually return to constitutional paths which, until recently, it has followed throughout its history.

SUPREME COURT OF THE UNITED STATES

No. 202.—October Term, 1964.

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[April 28, 1965.]

Mr. Justice Stewart, with whom Mr. Justice White joins, dissenting.

The petitioner chose not to take the witness stand at his trial upon a charge of first degree murder in a California court. Article I, § 13, of the California Constitution establishes a defendant's privilege against self-incrimination and further provides:

> "[I]n any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court, and by counsel, and may be considered by the court or the jury."

In conformity with this provision, the prosecutor in his argument to the jury emphasized that a person accused of crime in a public forum would ordinarily deny or explain the evidence against him if he truthfully could do so.[1] Also in conformity with this California constitutional provision, the judge instructed the jury in the following terms:

> "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within

[1] See the excerpt from the prosecutor's argument quoted in the Court's opinion, *supra*, at p. —.

his knowledge, if he does not testify, or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt."

The jury found the petitioner guilty as charged, and his conviction was affirmed by the Supreme Court of California.[2]

No claim is made that the prosecutor's argument or the trial judge's instructions to the jury in this case deprived the petitioner of due process of law as such. This Court long ago decided that the Due Process Clause of the Fourteenth Amendment does not of its own force forbid this kind of comment on a defendant's failure to testify. *Twining* v. *New Jersey*, 211 U. S. 78; *Adamson* v. *Cali-*

[2] 60 Cal. 2d 182, 383 P. 2d 432. As this case was decided before *Malloy* v. *Hogan*, 378 U. S. 1, the California Supreme Court did not give plenary consideration to the question now before us; however, that court has since upheld the federal constitutionality of the California comment rule in a thoroughly reasoned opinion by Chief Justice Traynor. *People* v. *Modesto*, 62 Cal. 2d 452, 398 P. 2d 753.

fornia, 332 U. S. 46. The Court holds, however, that the California constitutional provision violates the Fifth Amendment's injunction that no person "shall be compelled in any criminal case to be a witness against himself," an injunction which the Court less than a year ago for the first time found was applicable to trials in the courts of the several States.

With both candor and accuracy, the Court concedes that the question before us is one of first impression here.[3] It is a question which has not arisen before, because until last year the self-incrimination provision of the Fifth Amendment had been held to apply only to federal proceedings, and in the federal judicial system the matter has been covered by a specific Act of Congress which has been in effect ever since defendants have been permitted to testify at all in federal criminal trials.[4] See *Bruno* v. *United States*, 308 U. S. 287; *Wilson* v. *United States*, 149 U. S. 60; *Adamson* v. *California*, *supra*.

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[3] In the *Adamson* case, the present question was not reached because the majority ruled that the Fifth Amendment is not applicable to the States. Mr. Justice Reed's opinion made clear that the California rule was only assumed to contravene the Fifth Amendment, "without any intention . . . of ruling upon the issue." The dissenting opinion of MR. JUSTICES BLACK and DOUGLAS read the majority opinion as "strongly imply[ing] that the Fifth Amendment does not, of itself, bar comment upon the failure to testify," but they considered the case on the majority's assumption, thereby giving no approval to that assumption, even in dictum. That no such approval was given by this dissenting opinion is further made evident by the fact that Justices Murphy and Rutledge, also in dissent, felt it necessary to make what they characterized as an "addition" an expression of their view that the guarantee against self-incrimination had been violated in the case. Mr. Justice Frankfurter, in concurring, also indicated that he was prepared to agree that the Fifth Amendment barred comment, thus bringing to three the members of the Court who, in dicta, took the view embraced by the Court today.

[4] 20 Stat. 30, as amended, 18 U. S. C. § 3481.

We must determine whether the petitioner has been "compelled to be a witness against himself." Compulsion is the focus of the inquiry. Certainly, if any compulsion be detected in the California procedure, it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee. When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced.[3]

Those were the lurid realities which lay behind enactment of the Fifth Amendment, a far cry from the subject matter of the case before us. I think that the Court in this case stretches the concept of compulsion beyond all reasonable bounds, and that whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel. In support of its conclusion that the California procedure does compel the accused to testify, the Court has only this to say: "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Exactly what the penalty imposed consists of is not clear. It is not, as I understand the problem, that the jury becomes aware that the defendant has chosen not to testify in his own defense, for the jury will, of course, realize this quite evident fact, even though the choice goes unmentioned. Since com-

[3] See generally 8 Wigmore § 2250 (McNaughton Rev. 1961).

ment by counsel and the court does not compel testimony by creating such an awareness, the Court must be saying that the California constitutional provision places some other compulsion upon the defendant to incriminate himself, some compulsion which the Court does not describe and which I cannot readily perceive.

It is not at all apparent to me, on any realistic view of the trial process, that a defendant will be at more of a disadvantage under the California practice than he would be in a court which permitted no comment at all on his failure to take the witness stand. How can it be said that the inferences drawn by a jury will be more detrimental to a defendant under the limiting and carefully controlling language of the instruction here involved than would result if the jury were left to roam at large with only their untutored instincts to guide them, to draw from the defendant's silence broad inferences of guilt? The instructions in this case expressly cautioned the jury that the defendant's failure to testify "does not create a presumption of guilt or by itself warrant an inference of guilt"; they were further admonished that such failure does not "relieve the prosecution of its burden of proving every essential element of the crime," and finally the trial judge warned that the prosecution's burden remained that of proof "beyond a reasonable doubt." Whether the same limitations would be observed by a jury without the benefit of protective instructions shielding the defendant is certainly open to real doubt.

Moreover, no one can say where the balance of advantage might lie as a result of counsels' discussion of the matter. No doubt the prosecution's argument will seek to encourage the drawing of inferences unfavorable to the defendant. However, the defendant's counsel equally has an opportunity to explain the various other reasons why a defendant may not wish to take the stand, and

thus rebut the natural if uneducated assumption that it is because the defendant cannot truthfully deny the accusations made.

I think the California comment rule is not a coercive device which impairs the right against self-incrimination, but rather a means of articulating and bringing into the light of rational discussion a fact inescapably impressed on the jury's consciousness. The California procedure is not only designed to protect the defendant against unwarranted inferences which might be drawn by an uninformed jury; it is also an attempt by the State to recognize and articulate what it believes to be the natural probative force of certain facts. Surely no one would deny that the State has an important interest in throwing the light of rational discussion on that which transpires in the course of a trial, both to protect the defendant from the very real dangers of silence and to shape a legal process designed to ascertain the truth.

The California rule allowing comment by counsel and instruction by the judge on the defendant's failure to take the stand is hardly an idiosyncratic aberration. The Model Code of Evidence, and the Uniform Rules of Evidence both sanction the use of such procedures.[6] The practice had been endorsed by resolution of the American Bar Association and the American Law Institute,[7] and has the support of the weight of scholarly opinion.[8]

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[6] Model Code of Evidence, Rule 201 (1942); Uniform Rules of Evidence, Rule 23 (4) (1953).

[7] 56 A. B. A. Rep. 137–159 (1931); 59 A. B. A. Rep. 130–141 (1934); 9 Proceedings A. L. I. 202, 203 (1931).

[8] See Bruce, The Right to Comment on the Failure of the Accused to Testify, 31 Mich. L. Rev. 226; Dunmore, Comment on Failure of Accused to Testify, 26 Yale L. J. 464; Hadley, Criminal Justice in America, 11 A. B. A. J. 674, 677; Hiscock, Criminal Law and Procedure in New York, 26 Col. L. Rev. 253, 258–262; Note, Comment on Defendant's Failure to Take the Stand, 57 Yale L. J. 145.

The formulation of procedural rules to govern the administration of criminal justice in the various States is properly a matter of local concern. We are charged with no general supervisory power over such matters; our only legitimate function is to prevent violations of the Constitution's commands. California has honored the constitutional command that no person "shall be compelled in any criminal case to be a witness against himself." The petitioner was not compelled to testify, and he did not do so. But whenever in a jury trial a defendant exercises this constitutional right, the members of the jury are bound to draw inferences from his silence. No constitution can prevent the operation of the human mind. Without limiting instructions, the danger exists that the inferences drawn by the jury may be unfairly broad. Some States have permitted this danger to go unchecked, by forbidding any comment at all upon the defendant's failure to take the witness stand.[9] Other States have dealt with this danger in a variety of ways, as the Court's opinion indicates. *Supra*, note 3, at p. ——. Some might differ, as a matter of policy, with the way California has chosen to deal with the problem, or even disapprove of the judge's specific instructions in this case.[10] But, so long as the constitutional command is obeyed, such matters of state policy are not for this Court to decide.

I would affirm the judgment.

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[9] See, *e. g.*, *State* v. *Pearce*, 56 Minn. 226, 57 N. W. 652; *Tines* v. *Commonwealth*, 25 Ky. L. Rep. 1233, 77 S. W. 363; *Hanks* v. *Commonwealth*, 248 Ky. 203, 58 S. W. 2d 394.

[10] It should be noted that the defendant's counsel did not request any additions to the instructions which would have brought out other possible reasons which might have influenced the defendant's decision not to become a witness. The California Constitution does not in terms prescribe what form of instruction should be given and the petitioner has not argued that another form would have been denied.